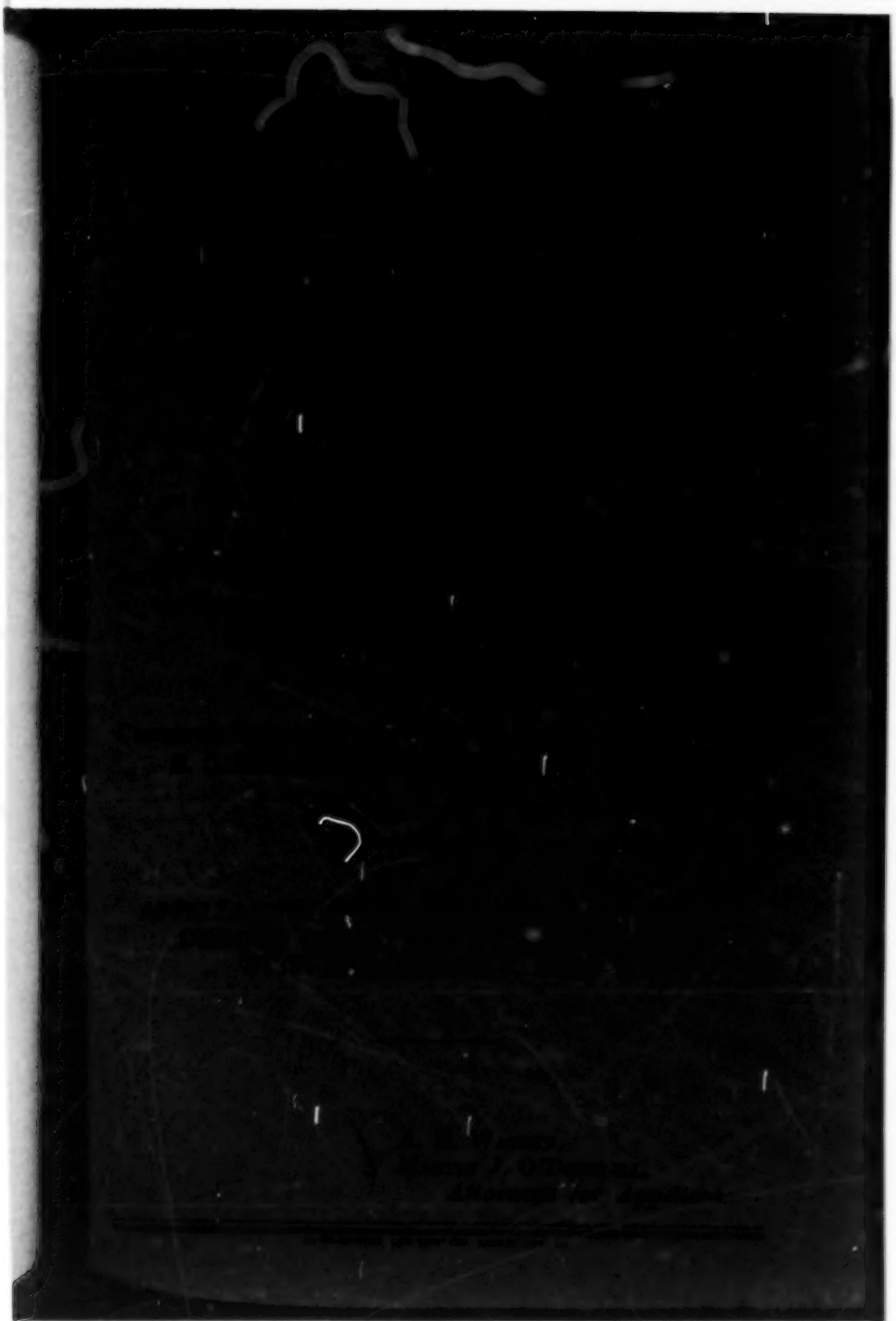

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In the Supreme Court of the United States

LOUISE McGREW MOFFETT and LOUISE McGREW MOFFETT as Executrix of the Estate of Thomas S. Moffett, Deceased, *Appellants*,

vs.

COMMERCE TRUST COMPANY, a Corporation, HELEN WEEDE, B. C. HOWARD and WILLIAM H. KOPP, *Appellees*.

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM IN ACCORDANCE WITH PARAGRAPH 3, RULE 7.

No. 318.

STATEMENT.

(Figures in parentheses refer to pages of certified copy of the record.)

This brief is prepared in opposition to appellees' suggestions and motion to dismiss or affirm (950-1062), as provided in paragraph 3 of Rule 7.

The facts stated show that appellees' suggestions and motion are without merit.

Appellees' demurrers admit that the fifth amended petition as amended (154-323) shows that appellees, pursuant to an unlawful conspiracy to deprive appellants of the rights secured to them by Section 1 of the XIVth Amendment, and other alleged rights secured by other provisions of the Constitution and laws of the United States, and a Treaty of the United States, under color of the laws of Missouri and Kansas, in combination with persons exercising the power of both states, committed wrongful, overt acts between the year 1921 and this date, which violated appellants' said federal rights and authorized recovery under R. S. U. S., Sections 1979, 1980, 1981. The facts as to such unlawful violations are alleged in said fifth amended petition as amended (225), (285-294), (322).

The failure of the Supreme Court of Missouri to give *res judicata* effect, as required by the state law, to the premises as well as to the conclusion of its own decision reported in 345 Mo. 741-751, in favor of appellants and against appellees Commerce Trust Company, B. C. Howard and Helen Weede, as alleged (308-318), in violation of appellants' right to its application under the equal protection of the laws clause of the XIVth Amendment, is raised in the petition for rehearing in the State Supreme Court (829-852). The same question is also preserved in the assignment of error No. 2 in this Court (934). The act of the State Supreme Court, in denying appellants' motion to transfer the case to the court *en banc* is questioned as error at the first opportunity in assignment of error 37 (940). (*Saunders* v. *Shaw*, 244 U. S. 317, l. c. 320; *Brinkerhoff-Faris Trust & S. Co.*, 281 U. S. 673.)

The assignments of error in the state court are referred to in its opinion (820). All of the assignments of error in the state court (945-948) involved federal questions under the allegation in assignment XXII (948). Said assignment

XXII in the state court states that by the preceding assigned errors appellant was "deprived of the rights secured to her by Section 1 of the XIVth Amendment, United States Constitution." The opinion of the court points out (820) that the court considered and decided the questions so raised in said assignments of error thus (820):

> "Appellants claim error under twenty-two numbered assignments, some being mainly a repetition of others. We have considered all of these assignments, but see no useful purpose in discussing each one separately."

Assignment 2 in the state court (945) draws in question the validity of Section 948, R. S. Mo. 1939, because of repugnancy to Section 10 of Article I of the Constitution, providing that "No State shall * * * pass any bill of attainder." The state court's opinion shows that it held said section valid and not repugnant to said provision of the Constitution (826-827). Said error is assigned as 14, 15, 16 and 18 in this Court (936-937).

The failure of the trial court in its assignment division to grant appellants a hearing on the issues presented by the pleadings (after the amendment was made on December 30, 1944), in violation of Rule 29 of the court (402-406) and in assigning the case to Assignment Judge Ridge's own Trial Division 6 (424) without notice as required by the rules, and in rendering the penal judgment rendered in said Division 6 without evidence, trial or hearing, in violation of the provisions of Section 1 of the XIVth Amendment to the Constitution, is specifically assigned as error in assignment V in the state court (945). Said action is assigned as error in this Court as assignments 16 (936-937) and 18 (937).

The conflict of the partnership administration statutes with Section 10 of Article I of the Constitution prohibiting bills of pains and penalties, the Treaty with France of 1803 (290), the involuntary servitude provision of the XIIIth Amendment, and the privileges, immunities and due process provisions of the XIVth Amendment, are specifically assigned in assignment IX in the state court (945), and referred to in the opinion of said court (820) as considered and decided and assigned as error in assignments 3 to 8, inclusive (935).

Assignment XV (947) invoked the equal protection of the laws clause of the XIVth Amendment specified in assignment XXII (948) as against the action of the trial court and the action of the legislature (291-293) in giving effect to the 1911 statute providing for "Special Judges, Laws Missouri, 1911," contrary to the provisions of Section 34 of Article VI of the Missouri Constitution of 1875 providing that there shall be a probate court in every county, which "shall consist of one judge" (291). Said error is assigned in this Court as 25 (938).

Appellees claim, on page 88 of their statement (1037), that Sections 43, 47 and 48, Title 8, U. S. C., gave appellants no right to maintain the action and that the state court correctly so decided. This, of itself, is a federal question (*Lovell* v. *Griffin*, 303 U. S. 450). The basis for the application of said federal statutes, to-wit: Sections 1979, 1980 and 1981, U. S. R. S., was whether the overt acts, pursuant to the conspiracy, deprived appellants of the rights secured to them by the XIVth Amendment due process and other provisions of the United States Constitution. The opinion (827), in specifically deciding that the facts alleged and admitted by appellees that

"Appellants have not been denied due process"

was a specific decision denying appellants right to recover under said Civil Rights Acts, and holding that they were invalid or without application. And also a specific denial of appellants' right to recover because of the violation of appellants' rights under Article III of the Treaty with France of 1803 (290), and of all the provisions of the Federal Constitution referred to in the fifth amended petition as amended (827). Said error is assigned in various forms as 10, 11, 12 and 13 (935-936) in this Court.

The State Supreme Court held that the petition did not state a cause of action and thus decided that none of the violations of the rights, privileges and immunities violated by the overt acts, pursuant to the conspiracy and secured by the Federal Constitution, Laws and Treaty alleged in the pleading authorized appellants to recover and that appellants were not deprived the due process protection of the XIVth Amendment. The opinion states:

> " • • • we recognize the distinction between 'defect of parties' and 'misjoinder of parties,' although not listed in the statute, is a ground of demurrer because in that situation the petition *does not state a cause of action.*" (821.)
>
> "These allegations and many others show *that no joint cause of action is stated.* Such defect *appearing on the face of the petition,* under the old code, could be reached by demurrer. • • •" (823.)
>
> Judge Ridge sustained the demurrers on the sole ground of misjoinder of parties, but the demurrers also attacked the petition • • • *for failure to state a cause of action.* We think the reason assigned by the trial court is sufficient, but *his ruling can be sustained on the other grounds mentioned.*" (823-824.)
>
> "The pleadings ruled upon by Judge Ridge • • • but the complaint as to defect of parties and *failure to*

state a cause of action were clearly stated. Such could be determined from the face of the petition." (825.)

"Appellants have not been denied due process." (827.)

The opinion as above quoted destroys the contention of appellees on page 19 of their suggestions (968) that

"All that the Supreme Court of Missouri has decided, in the instant case, is that under the applicable law appellants had no right to maintain *jointly* the instant suit. The *trial court* sustained the demurrers *on the one ground of misjoinder of parties plaintiff.*"

* * * * * * *

"Consequently, there was no decision against the validity of Sections 1979, 1980 and 1981, U. S. R. S. (Secs. 43, 47 and 48, Title 8 U. S. C.) or against the right of either appellant to maintain an action thereunder."

Appellees, consequently, are thus making the same suggestions to this Court which are reflected in the finding of fact by the circuit court to the effect that "upon the record and suggestions of counsel for said defendants now appearing" (424), three petitions have been held insufficient on the ground of misjoinder of parties plaintiff, whereas the general orders purporting to sustain same (60-61, 152-153) are general orders purporting to sustain the demurrers on every ground alleged. And the opinion of Judge Wright specifically points out that he held that the petition failed to state a cause of action under the federal statutes, saying:

(See Exhibit "A" hereto attached.)

"Plaintiff contends that the conspiracy alleged violates the Federal statutes giving a cause of action

for the deprivation of any rights, privileges or immunities secured by the Constitution and laws, and contends that this issue was not in the Kansas cases. I am persuaded that plaintiff's petition does not state a cause of action under the statutes relied upon, and I am further convinced that even though the acts alleged would constitute a cause of action under the Federal statutes, yet the overt acts or matters and things about which plaintiff complains have been tried and determined and cannot be now relitigated as a basis of a cause of action."

While the decision of the circuit court through Judge Ridge is an evident attempt to keep federal questions out of the case, based upon "suggestions of counsel for said defendants now appearing," yet the opinion of the circuit court, through Judge Wright, specifically shows that his decision in the trial court was against the validity of said sections when he held that said petition did not state a cause of action. And whether the decision was against the validity of said sections, or was a failure to apply said sections correctly, said facts show that the *trial court* did decide said federal questions arising under said Civil Rights Acts, the "suggestions of counsel for defendants" to the contrary notwithstanding. And when the State Supreme Court declared that the petition did not state a cause of action, then, under the facts alleged, said decision was a decision holding them invalid, under *United States* v. *Sutton,* 215 U. S. 291, l. c. 294, and a decision affirming the decision of the trial court which had in Judge Wright's division specifically decided the federal question that appellants could not recover under the federal statutes, which decision was implicit in the judgment of affirmance in the State Supreme Court.

The Circuit Court on December 30th, 1944, erred in sustaining the alleged demurrers because the papers so entitled in Judge Terte's court were mere collateral attacks on the orders of Judge Buzard (47, 51) overruling motions to strike for the same alleged cause of misjoinder of parties plaintiff on May 27, 1942, and on the order of August 10, 1942 (51), of Judge Buzard overruling the demurrer of respondent Kopp.

In *Scott* v. *Rees*, 300 Mo. 123, l. c. 132, it is said:

> "The legal character of a pleading is to be determined by its substance, not by its name,"

citing *State ex rel.* v. *Ellison*, 266 Mo. 423. The latter case was by the court *en banc*, in which case defendant filed a motion to strike. Said motion was sustained, and later defendants filed a motion praying that the cause be dismissed as to them. No motion for a new trial was filed. The Court of Appeals held that its inquiry could not be extended to any matter of exception because no motion for a new trial was filed. The Court of Appeals also held that the motion to dismiss could not be treated as the legal equivalent of a demurrer, and declined to review the ruling of the trial court on the motion to dismiss. In quashing the opinion of the Court of Appeals the court said, l. c. 429:

> "The court announces the general and uniformly accepted doctrine that the legal character of a pleading is to be determined by its substance, and not name, and that motion to strike out or to dismiss may fill the office of a demurrer, and be so treated, where it is, to all intents and purposes, a demurrer, and is dispositive of the whole case as a matter of law."

Since it was the duty of the court to examine the record to ascertain whether or not three demurrers had been

lawfully sustained, then of course Judge Ridge was charged with that duty and notice of that which was apparent on the record of the assignment division at the time he sustained the demurrer to the fifth amended petition and made his finding of fact in said assignment division. In fact, the only record which he could notice in the assignment division was that of Judge Buzard, with reference to rulings on demurrers, because no demurrer had been ruled on in the assignment division by any judge excepting Judge Buzard. On the contrary, the record in the assignment division disclosed that Mr. Kopp's demurrer (so named) had been overruled, and excepted to by all respondents (51); and that the motions to strike of the other respondents, on the ground that there was a misjoinder of parties plaintiff, had been overruled and such ruling was likewise jointly excepted to by all the respondents.

The finding by Judge Ridge that Judges Terte, Wright and Ridge had sustained the alleged demurrers upon the ground of misjoinder of parties plaintiff would seem to be conclusive of the proposition that the orders of Judge Buzard overruling the motions to strike based on that ground were overrulings of what, in legal contemplation, were demurrers on that ground, if such ground could be considered as a basis of demurrer. Judge Ridge wholly ignored said rulings of Judge Buzard, which rulings in and of themselves prevented contrary rulings by Judge Terte on the same first amended petition upon the same grounds and likewise prevented Judge Ridge from counting the order of Judge Terte in arriving at the conclusion that three demurrers had been sustained.

The law in Missouri, and in the State and Federal courts as declared by three Justices of the Supreme Court of the United States prevented any assignment judge in

the same case and in the same court from making any ruling contrary to those made by Judge Buzard, since Judge Buzard's rulings were never set aside nor modified. And said respondents did not stand on said rulings but sought to have Judge Terte exercise supervisory control and appellate jurisdiction over the rulings of Judge Buzard.

The question here presented has been discussed in the leading case of *Commercial Union of America* v. *Anglo-South American Bank*, 10 Fed. (2d) 937 (C. C. A. 2). In that case a motion to dismiss an action was filed in the District Court before one judge, which motion was overruled. Thereafter a similar motion was presented to another district judge as to the same petition, as here, and the motion was sustained and the action was dismissed. On appeal the only question determined was, what should the appellate court do in the case, the court saying, l. c. 938:

> "It is contended by the plaintiff that the order first made, sustaining the sufficiency of the complaint, rendered the question of *res judicata* as between the parties, and was the law of the case, binding upon the other judges of the court."

The court then referred to an opinion of Justice Miller of this Court in *Appleton* v. *Smith*, 1 Fed. Cas. 1075, Fed. Cas. No. 498, while sitting as a circuit justice wherein he said, l. c. 938:

> "Where, as in the present case, the motion is made on the same grounds, and with no new state of pleadings or facts, it is nothing more than an appeal from one judge of the same court to another, and though it is my province in the Supreme Court to hear and determine such appeals, I have in this court no such

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prerogative. The district judge would have the same right to review my judgments and orders here as I would have in regard to his. It would be in the highest degree indelicate for one judge of the same court thus to review and set aside the action of his associate in his absence, and might lead to unseemly struggles to obtain a hearing before one judge in preference to the other."

In *Cole Silver Mining Co.* v. *Virginia & Gold Hill Water Co.*, 6 Fed. Cas. 72, Mr. Justice Field of this Court, sitting in the Circuit Court, said, l. c. 939:

"The Circuit Judge possesses, as already stated, equal authority with myself in the circuit and it would lead to unseemly conflicts, if the rulings of one judge, upon a question of law, should be disregarded, or be open to review by the other judge in the same case."

In *Reynolds* v. *Iron Silver Mining Co.*, 33 F. 354, Justice Brewer of this Court, sitting in the Circuit Court of Colorado, cited with approval what was said by Justice Miller in *Appleton* v. *Smith, supra,* going on to say, l. c. 939:

"You all know, at least those who have been familiar with the jurisprudence of the State of New York, how many unseemly struggles there have been, as Justice Miller refers to, to get a case now before one judge, and then before another. Under their peculiar system, you get an order before one judge; the beaten party goes to another judge, gets an order staying proceedings, and sets down a motion before a third to vacate the order, and one never knows when the litigation is at an end, or where it is to continue; whereas, if it is all continued before the same judge from the commencement to the close, there is a consistency in the rulings, if nothing else; and I think that the orderly administration of justice

requires, and justice itself will in the long run and the general average be best secured, if litigation commenced before one judge continues before him until it shall be taken to an appellate tribunal."

The court in *Commercial Union* v. *Anglo South American Bank*, (10 Fed. (2d) *supra*) concluded by saying, l. c. 941:

"It appears, therefore, that in dismissing the complaint he thought the decision of this court in the Old Colony Trust Co. Case, and handed down after Judge Mack had made the original order sustaining the sufficiency of the complaint, was erroneous in law, ought to be disregarded by him, and required the dismissal of the action. In so holding we think he made a serious mistake, quite irrespective of whether or not the Old Colony Trust Co. Case was correctly construed by him. The counsel for the plaintiff in error insists that that case is plainly distinguishable from this in its facts, and is not at all governed by it. We shall not pass upon that question at this time, but content ourselves with holding that the decision made by Judge Mack was the law of the case as established in the District Court, and should have been so treated by any other judge sitting in the same case in that court. Judges of co-ordinate jurisdiction, sitting in the same court and in the same case, should not overrule the decisions of each other.

For that reason and that reason only, the judgment is reversed, and the District Court is directed to reinstate the action and grant the motion to amend the complaint."

The law of Missouri is the same as the law above stated by three Justices of the Supreme Court of the United States, and others:

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In *State ex rel.* v. *Buckner,* 207 Mo. App. 48, l. c. 53, the applicable law is stated:

> "However, whether a motion in a given case may be regarded as *res adjudicata* or otherwise, *the first decision upon the same is considered conclusive and is a bar to a similar maintenance of substantially the same motion upon substantially similar facts,* and may not be renewed before either the same or a different judge, unless leave of court is first obtained to present the same matter again. (14 Ency. of Pleadings and Practice, 178-181, 28 Cyc. 18, 19.)"

In *Bennett's Adm'r* v. *Russell's Adm'r,* 39 Mo. 152, the syllabus states the rule that:

> "The action of the court refusing to set aside an order previously made upon motion of a party alleging that he had not appeared to, nor had notice of the motion upon which the order was made, concludes the party."

In *State ex rel. Allen* v. *Buckner,* 226 Mo. App. 807, it was held that an order for temporary alimony could not even be stayed or interfered with by another judge sitting in another division.

The court was without right to consider the separate demurrers so long as the orders, made May 27 and August 10, 1942 (47, 51), overruling the pleading that the first amended petition misjoined parties plaintiff, remained on the record. And the filing of the alleged demurrers to the first amended petition beginning on September 2, 1942 (51), after said orders were entered, and their being sustained many terms after the May term, 1942, were void proceedings. The principle is well stated in 42 C. J. 519, Sec. 177, citing Missouri authority:

> "Notwithstanding the decision of a motion may not operate strictly as *res judicata*, it will ordinarily be considered as conclusive to the extent of barring the renewal of the same or a similar motion, once denied on the merits, based on the same or similar facts either before the same or before a different judge, unless leave of court is obtained to present the same matter again."

In *Ruggles* v. *International Ass'n Iron Workers*, 331 Mo. 20, it is said, l. c. 26:

> "When a pleading, although denominated a motion, 'performs the office of a demurrer and disposes of a case, it may be treated as a demurrer and therefore a part of the record proper of which we may take cognizance, although it is not contained in the bill of exceptions'."

The first pleading to the first amended petition was the properly entitled separate demurrer of William H. Kopp (44-45) alleging that said petition "does not state facts sufficient to constitute a cause of action against this defendant." Commerce Trust Company also filed a document which is labelled "Separate Motion of Defendant Commerce Trust Company to Strike Out Plaintiff's Petition" (45-47).

The main ground therefore is:

> "(b) The respective claimed or alleged rights, demands or causes of action which it is asserted in said first amended petition inure to the said Louise McGrew Moffett in her said respective individual and representative capacities, as will appear from the allegations of said first amended petition, are separate, distinct and inconsistent and cannot in any event be asserted jointly and concurrently in this

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action by the said Louise McGrew Moffett in her said respective capacities as an individual and as Executrix of the estate of Thomas S. Moffett, deceased."

Said motion was dispositive of the whole case.

A motion filed by Mrs. Weede to strike (46) alleged that:

> "As appears especially in the caption and in the first paragraph of the first amended petition herein, and also in the entire first amended petition, plaintiff Louise McGrew Moffett improperly attempts to unite and join an alleged claim which plaintiff alleges is due her personally with an alleged claim plaintiff also asserts is due her as executrix of the estate of Thomas S. Moffett, deceased."

Appellee Howard (44) asked that the first amended petition be stricken because:

> "• • • said first amended petition makes Louise McGrew Moffett and Louise McGrew Moffett as executrix of the estate of Thomas S. Moffett, deceased, joint plaintiff in said action; • • •"

Said pleadings so labelled separate motions, were overruled on May 27, 1942 (47), and the pleading of Kopp, entitled demurrer, was overruled on August 10, 1942 (51).

The said alleged grounds set forth in the motions of the Trust Company, Howard and Weede, with reference to alleged misjoinder, are not properly grounds of demurrer included in Section 922, R. S. Mo. 1939. Consequently, an alleged demurrer, including an alleged ground of misjoinder of parties plaintiff, does not give, and did not give, a Circuit Court jurisdiction to dispose of appellant's case on an alleged ground which the statute did not

authorize. And especially is this true for the reason that in this case said respondents presented the concrete question, later submitted to the court in alleged demurrers, of misjoinder of parties plaintiff; and Judge Buzard, after due consideration, overruled the respondents' contentions on said issue.

The orders overruling said motions (47), as well as the order overruling Kopp's demurrer (51), were never set aside. Consequently, the succeeding assignment judges were without jurisdiction to dispose of the case on the same identical ground.

Commerce Trust Company, on June 16, 1942, filed a motion (47-50) praying the court to require plaintiff to conform to Sections 916 and 917, R. S. Mo. 1939, in which it alleged that if plaintiff complied with said Sections such compliance would so affect said first amended petition that

> "• • • said first amended petition would be subject to attack by demurrer, because the same, contrary to law, would set forth • • • improperly joined parties plaintiff • • • same also would be subject to demurrer for failure of said first amended petition to state sufficient facts to constitute a cause or causes of action, and on other grounds." (49-50.)

Said motion, after due consideration, was overruled by Judge Buzard on August 10, 1942 (51).

It thus appears that respondent Commerce Trust Company, for itself and the other respondents, admitted that the joinder of appellant in both capacities did not render the petition demurrable, and presented same to one of the circuit judges who passed on said question and, after full consideration, overruled the appellees' contention on

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the issue thus tendered by the Commerce Trust Company, and said ruling has never been set aside.

Graves v. *Dakessian*, 132 S. W. (2d) 972, points out that the motions before Judge Buzard, in this record (44-47, 47-51), are before the Court for consideration if, as respondents successfully contended, misjoinder of parties plaintiff can be raised by demurrer, by saying, l. c. 974:

> "There is an exception in those cases where a motion serves the office of a demurrer. In such case the motion is a part of the record so that a ruling thereon may be reviewed in the absence of a bill of exceptions."

The record entry shows not only that the order overruling the separate motions of respondents Weede, Commerce Trust Company and Howard to strike plaintiff's amended petition did not indicate that the court granted leave to review its motions in the same or any other form, but on the contrary, it says the following: "to which ruling of the court said defendants except. Said defendants are given 20 days to plead herein" (47). Thus it appears that Judge Buzard's ruling on said motions was final. And also that his order overruling the separate demurrer of respondent Kopp (51) was in like condition, for, instead of having the order grant any leave to review the same question, the respondents jointly excepted to the ruling. It would seem that these orders were final, and, of course, Judge Terte was without power at the May term, 1943, to grant a rehearing of the same matter heard by Judge Buzard when Judge Buzard's orders were made at the May, 1942, term.

Only the assignment judge who decided the motion when first made can vacate an order made on the particular

motions or demurrers. (*Chadeloid Chemical Co.* v. *H. B. Chalmers Co.*, 242 Fed. 71; *Kenny* v. *Kelleher*, 63 Cal. 442; *United Drug Co.* v. *Cordley*, 239 Mass. 334; *Carlisle* v. *Barnes*, 183 N. Y. 272).

> "Running around from one justice to another, who may be thought to entertain a more favorable view of the situation presented, is a practice which courts are not inclined to favor." (*Kalichman* v. *Nadler*, 34 Misc. 809, 810, 68 NYS 396. See also *American Hosiery Co.* v. *Himler*, 78 Misc. 32, 34, 137 NYS 702.)

> "Where a motion has been decided it should not be reviewed before another justice in another guise, but in reality to vacate, reverse and annul the prior decision." (*Elias* v. *Coleman*, 89 Misc. 289, 290, 153 NYS 573.)

The fifth amended petition as amended raises the objection that the rules of the Circuit Court of Jackson County, Missouri, purporting to authorize a succeeding assignment judge to make up issues was in conflict with the provision of Section 10 of Article II of the Constitution requiring that right and justice be administered without delay, and that for said reason Rule 18 (296-297), purporting to permit Judge Terte to finish making up the issues which Judge Buzard had spent three terms trying to make up, was void because in conflict with the above section.

Appellants were entitled to be heard with reference to the foregoing questions of fact and law by Judge Ridge before he made his finding of fact and rendered the judgment of dismissal, penalty and forfeiture. They were also entitled to call Judge Ridge's attention to the fact that the fifth amended petition as amended was not demurrable, not only because Section 922 did not authorize a demurrer

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on said ground, but also on the ground that under Section
79 ~~1379~~, R. S. U. S., and the statutes of Missouri, Sections 856, 857 and 858, R. S. Mo. 1939, appellants were entitled to institute and maintain the action, because it accrued in Kansas and accrued under the Federal civil rights acts and in the Federal Courts, and that the state court was bound to give effect to the supreme law on the questions presented, and that the petition stated a cause of action, and was not demurrable on any ground. And that, in any event, appellees had lost any right to any benefit from the old code, and appellants were entitled to the benefit of the new code effective the following court day, under the provisions of the XIVth Amendment. The denial by Judge Ridge of that right and its affirmance by the State Supreme Court in itself violated appellants' right to a hearing under the XIVth Amendment and necessitates a reversal, without any reference to any other federal question in the case.

The foregoing statement is made in connection with and as part of the jurisdictional statement (890-923) and assignments of error (934-940) on file in this Court and cause which are made part hereof.

Due to the representation of appellees made to this Court that neither the trial court nor the State Supreme Court had decided any federal question, we attach hereto as Exhibit "A" the opinion in the case delivered by Judge Emory H. Wright of the circuit court, with his letter of transmittal to counsel.

As we understand paragraph 1 of Rule 12, said opinion being an earlier opinion in the same case should have been appended to the jurisdictional statement. And now, in view of appellees' contention concerning the decision of federal questions by trial and Supreme Court, we append said opinion hereto.

Exhibit "A."

EMORY H. WRIGHT
Judge of the Circuit Court
Division No. 1
Kansas City, Mo.

May 9, 1944.

Mr. Martin J. O'Donnell,
Mr. A. E. Watson,
Attorneys at Law,
1232 Dierks Bldg.,
Kansas City, Missouri.
Judge James E. Goodrich,
Attorney at Law,
218 Commerce Bldg.,
Kansas City, Missouri.
Mr. John T. Harding,
Attorney at Law,
831 Scarritt Bldg.,
Kansas City, Mo.
Mr. William D. Bush,
Attorney at Law,
831 Scarritt Bldg.,
Kansas City, Mo.
and
Mr. Glen A. Wisdom,
Attorney at Law,
519 Commerce Bldg.,
Kansas City, Mo.

(Re: Moffett v. Commerce Trust Co., et al. No. 479103.)

Gentlemen:

I am today sustaining demurrers filed by defendants in the above-entitled cause, and enclosing memoranda.

Very truly yours,

E. H. WRIGHT.

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In the Circuit Court of Jackson County, Missouri, at Kansas City.

May Term, 1944. Division One.

LOUISE MCGREW MOFFETT and LOUISE MCGREW MOFFETT as Executrix of the Estate of Thomas S. Moffett, deceased, *Plaintiffs*,

vs. No. 479103.

COMMERCE TRUST COMPANY, a Corporation, HELEN WEEDE, ORLIN A. WEEDE, B. C. HOWARD, WILLIAM H. KOPP and R. E. COPMAN, *Defendants*.

This matter is presented upon the Demurrers filed by the several defendants to plaintiff's Third Amended Petition. The ardor with which the Demurrers were presented by able lawyers on the one side and defended against on the other, causes me to approach a decision with some trepidation. This because it is hardly conceivable that such a vigorous and earnest presentation could be made by men learned in the law if the contention on either side was wholly without merit.

It has been my practice generally, where a case is presented on brief, to indicate by means of a short memoranda my theory of the points presented. A discussion of all the points presented by brief in this case would extend this memoranda beyond any possible advantage to the parties concerned. I shall, therefore, limit my memoranda to a general statement touching the decisive points briefed.

I.

The question as to what extent the Court may consider the Kansas state and Federal decisions, in passing upon the Demurrers, presents itself at the outset. In other words, does plaintiff's petition plead the decisions of the Kansas and Federal courts sufficiently to require this Court to take judicial notice of the law of the cases referred to in plaintiff's petition.

It is my view that in so far as the plaintiff's petition relies upon the Kansas cases as a basis of her cause of action they should be considered by the Court as the law of the case for the purpose of passing upon the Demurrers.

II.

It is urged that the Missouri statute which authorizes the election of a member of the Bar to act as probate judge is unconstitutional and void; hence, the order made by Sam B. Strother, appointing the Commerce Trust Company as administrator of the Moffett Brothers partnership estate is a nullity. On this point I have concluded that the statute as passed was not an attempt to reorganize or change a constitutional court, but was merely an attempt to provide for the appointment of someone to act as judge in the absence of the regular judge of a court already established, and that if the legislature had no power to enact the statute, the individuals elected and acting under the statute were *de facto* officers whose acts cannot be collaterally attacked. I think the Supreme Court of Kansas correctly declared the law on this point.

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III.

Defendants in argument in support of their demurrers urge that the facts set out in plaintiff's Petition have been tried and determined by the state and Federal courts of Kansas, and that the issues thus raised are *res adjudicata*.

On this point it is my conclusion that every act alleged in plaintiff's Petition as a basis of her cause of action, which was litigated or which could have been litigated in the Kansas cases, is *res adjudicata*, and cannot be a basis of a cause of action while the Kansas judgments stand unimpaired. This applies to practically all of the plaintiff's allegations of overt acts alleged to be in pursuance to the alleged conspiracy.

Plaintiff contends that the conspiracy alleged violates the Federal statutes giving a cause of action for the deprivation of any rights, privileges or immunities secured by the Constitution and laws, and contends that this issue was not in the Kansas cases. I am persuaded that plaintiff's Petition does not state a cause of action under the statutes relied upon, and I am further convinced that even though the acts alleged would constitute a cause of action under the Federal statutes, yet the overt acts or matters and things about which plaintiff complains have been tried and determined and cannot now be re-litigated as a basis of a cause of action.

IV.

Plaintiff asserts that whatever effect the Kansas cases may have had upon the question of *res adjudicata* has been set aside and superseded by the decision of the Supreme Court of Missouri, in the Howard case. To me it is apparent that the Howard case has decided one issue, that being the right of B. C. Howard to collect an attorney's

fee for services rendered. The jurisdiction of the Circuit Court and the Supreme Court, in passing upon the Howard case, was circumscribed by the jurisdiction of the Probate Court in that particular proceeding. The appellate jurisdiction being derivative can be no broader than the jurisdiction of the Probate Court.

Commissioner Bohling gives apt expression to the general rule in *Re Miller Estate*, 162 S. W. (2d), l. c. 810, in which he says:

> "The circuit court only acquires jurisdiction over the matter litigated and fought out in the probate court from which the appeal is taken."

It would appear then that no decision of the Supreme Court in such a proceeding could extend or limit the authority or binding effect of the Kansas judgments.

The mere fact that dual representation prevents an attorney from enforcing the collection of his fee does not necessarily in all cases mean that a judgment in a case in which there was dual representation would be void, as illustrated by the decisions of the Kansas Courts.

In *Moffett* v. *Mofffett*, 131 Kansas 588, the court observes:

> "Appellant contends that the Commerce Trust Company is intervening in two capacities which are in conflict, but we think there is no such conflict as would make it difficult for the trial court to ascertain and adjudicate the respective rights of the parties."

And in *Moffett* v. *Robbins*, 81 Fed. (2d), l. c. 437, the court said:

> "The mere allegation that there was no adversary trial is a conclusion which the record affirmatively disproves."

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To me it is clear that the Missouri Supreme Court did not attempt to say what effect the Howard fee case would have upon the Kansas judgments. Further, it is apparent that the Kansas courts knew of the dual representation and refused to disturb the judgments on that account.

V.

On the question of misjoinder of parties plaintiff, I am inclined to the view that *Neiderberg* v. *Golluber*, 162 S. W. (2d) 592, and *Rockwood* v. *Crown Laundry Company*, 178 S. W. (2d) 440, state the general rule for the joinder of a plaintiff personally and in a representative capacity in a suit at law. This being a suit at law, I am of the opinion that the foregoing cases are decisive of the right of the plaintiff in this case to join a personal claim and a claim as administratrix.

In keeping with the foregoing views, I am entering an order sustaining the separate Demurrers of the defendants named in the title hereof.

E. H. WRIGHT.

This Court has never permitted the Missouri supreme court to construe a federal law so as to prevent its application in the way Congress intended (Pryor v. Williams, 254 U.S. 43), nor any other State (C.& O. Ry. Co. v. Kuhn, 284 U.S.44).

Nor will it permit a state statute to be applied by a federal court to cut down federal rights (Holmberg v. Armbrecht, 90 Law Ed. 590).

Section 43 Title 8 U.S.C. created rights which the State could neither cut down nor destroy.

ARGUMENT.

A.

Appellees quote from the opinion of the Supreme Court of Missouri herein and have attached four other opinions, all of which are alleged to be invalid by appellants, whereas, by so doing, appellees beg the question. And so we call attention to the fact that an opinion or judgment attacked cannot be set up as a bar to the attack under the authorities:

In Broom's Legal Maxims, 8th Ed., l. c. 133:

> "*Non potest adduci exceptio ejusdem rei cujus petitur dissolutio* (Hac. Max., reg. 2).—A matter, the validity of which is at issue in legal proceedings, cannot be set up as a bar thereto."

In discussing the maxim Broom said:

> "Where the legality of some proceeding is the matter in dispute between two parties, he who maintains its legality, and seeks to take advantage of it, cannot rely upon the proceeding itself, as a bar to the adverse party. It is obvious that to do so would involve the logical fallacy of *petitio principii*, and would in many cases preclude all redress to an aggrieved party."

In *Strother* v. *Hutchinson*, 4 Bing. 83, 89, 91, 33 E. C. L. 283, l. c. 287, Chief Justice Tyndal said, in a case before the court by writ of false judgment, that the false judgment itself could not be set up as a bar to the relief sought, in these words:

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"But that is setting up as a defense, the thing itself which is of the substance of complaint; a course which is prohibited by the maxim, *'Non potest adduci exceptio ejusdem rei cujus petitur dissolutio.'* "

Coltman, J., in the same case, l. c. 288:

"And as to the argument that upon a record of nonsuit, the plaintiff cannot be supposed to have been present to tender the bill of exceptions, it is answered by the maxim, *non potest adduci exceptio ejusdem rei cujus petitur dissolutio.*"

Lirette v. *Lirette*, 176 La. 367, l. c. 370, 145 So. 773:

"The defendants pleaded, first, the exception of misjoinder of parties defendant; second, *res adjudicata;* and third, no cause of action. The district judge sustained the plea of *res adjudicata*, and dismissed the plaintiff's suit. They have appealed from the decision.

"Inasmuch as there is no other judgment referred to in the record, we assume that the plea of *res adjudicata* was founded upon either one or both of the judgments which the plaintiffs are attacking. In a suit to annul or reform a judgment, a plea of *res adjudicata* cannot be based upon the judgment which is sought to be annulled or reformed. *Edwards* v. *Edwards*, 29 La. Ann. 597; *Holbrook* v. *Holbrook*, 32 La. Ann. 13; *Heroman* v. *Louisiana Institute*, 34 La Ann. 805; *Anderson* v. *Benham*, 40 La Ann. 336, 4 So. 454; *Lazarus* v. *McGuirk*, 42 La. Ann. 194, 8 So. 253; *Succession of Williams*, 168 La. 1, 121 So. 171."

In Black on Judgments, Sec. 321:

"• • • in an action to set aside the judgment on the ground of fraud, neither the judgment sought to

be vacated, nor an order to set aside a default and permit an answer in that case, can be set up as a bar to the action."

In 34 C. J. 481 it is said:

> "The judgment attacked cannot be pleaded as a bar or as *res adjudicata.*" *States* v. *Cromwell,* 14 N. E. 448 (N. Y.).

In *Easton* v. *Russell & Collier,* 3 Mo. 379, it is said, Syl. 1:

> "A former recovery pleaded in bar to an appeal for relief against a judgment at law alleged to have been obtained by fraud will not avail the defendant."

Appellees admit by their demurrers facts showing the invalidity of the Kansas judgments.

Appellees, in violation of the rules, have loaded the abstract with "EXTRACTS" from the 3-volume record in the Howard fee case, consisting of evidence largely offered by them with reference to the Kansas judgments rendered by the Kansas judge, admitted by them to be corrupt, shown at pages 531 to 803 of the record.

The three printed and one typewritten opinions and specifications (1051-1062) are of no aid to the court, by reason of the application of the above principle. And two of these opinions are opinions wherein no appellee was a party in the suits wherein they were rendered, and hence, they might as appropriately have attached Cervantes account of the windmills or Gulliver's Travels to their suggestions.

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B.

In "War Powers Under the Constitution," 42 A. B. A. Rep. 232, the former Chief Justice Hughes quotes from an unpublished opinion by Abraham Lincoln as to the right of a State to write an exception into the Constitution which is not in it with reference to its power to pass a conscription act. Said Mr. Lincoln:

> "The power is given fully, completely, unconditionally. It is not a power to raise armies *if state authorities consent;* nor if the men to compose the armies are entirely willing; but it is a power to raise and support armies given to Congress by the Constitution without an 'if'."

And so the Constitutional command as to the supreme law does not condition the supremacy of that law on an "if" that the state judges consent; nor if the parties are willing. But of its own force the supreme law is made supreme by the Constitution, without an "if." And then, to preclude all possibility of an "if," such "if" is excluded by the provision that, as to the supreme law—

> "• • • the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

To enforce that supreme law (or if possible), make said supreme law more supreme, the Congress enacted the Civil Rights Act, of which we reproduce Section 1979 (Section 43, Title 8, U. S. C. A.):

> "Sec. 43. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other

> person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S., Sec. 1979."

The provision as to the supreme law operates on said Section 1979, and as to this case makes it the supreme law of the State of Missouri, and of all the States. And its enforcement does not depend upon the proposition that it is enforceable if the State authorities consent, nor if the parties are willing to have it enforced; but, of its own force, and under the constitutional provision, said section is supreme in this case, without an "if." And all possibility of its being made non-enforceable by an "if" is excluded by the provision that as to said statute in this case:

> "* * * the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

The word "party" appearing in said statute means one or more. For instance, in Section 71, Title 28, U. S. C. A., the word "party" as used in said act of Congress means all who are plaintiffs or defendants jointly on one side or the other. (*Mutual Life Ins. Co.* v. *Champlain*, 21 Fed. 85, 90.) "Party" has been held to mean all parties to one side collectively. *Peters* v. *Banta*, 120 Ind. 416, 22 N. E. 195; *Leavell* v. *State*, 43 N. E. 68, 16 Ind. App. 72; *Rupp* v. *Swineford*, 40 Wis. 28; *Cook* v. *Cook*, 41 Md. 362.

R. S. Mo. 1939

It would seem that Section 652 in Art. 2, Chap. 4, under the heading "Construction of Statutes," required the Missouri state court, if its authority is to be measured

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by the standard set by the appellees, to read the words "shall be liable to the party injured" in R. S. 1979 to include more than one party, and at least to include a single party in more than one capacity. Said section is as follows:

> "Sec. 652. When any subject-matter, party or person is described or referred to by words importing the singular number or the masculine gender, several matters and persons, and females as well as males, and bodies corporate as well as individuals, shall be deemed to be included."

See also Section 1 Title 1 U.S.C.

The word "any" in the phrase "any citizen of the United States or other person" in R. S. ~~1997~~ 1979 did not restrict the citizens of the United States, or other persons, who might be injured to one, under the decision of the Supreme Court of Missouri in *State* v. *Lumber Company*, 321 Mo. 461, construing Section 652. In that case the court said, l. c. 498-499:

> "The word 'any' is not an unyielding term, but one which readily yields to the legislative intent as reflected by the context of the act. And when the context so indicates, the word may be construed to mean 'one or more,' 'several,' 'some' or 'an indefinite number,' etc. (1 Bouvier's Law Dictionary, p. 205, title 'any'; 1 Century Dictionary, p. 253, title 'any'; *Platt* v. *City of Payette*, (Idaho) 114 Pac. 25; *West Chicago Park Commissioners* v. *McMullen*, 134 Ill. 170, l. c. 179-180; *Glen Alden Coal Co.* v. *Scranton*, 282 a. St. 45, l. c. 48; *Pioneer Construction Co.* v. *State Bank*, (Okla.) 158 Pac. 894; *Klotz* v. *Bank*, (Ind.) 134 N. E. 220, l. c. 222.)
>
> 'Furthermore, the applicatory rule of construction in force in Missouri would seem to leave no room for contention. We are admonished by statute to so construe statutory words importing the singular number

> as to include the plural (several) 'unless it be otherwise specifically provided or unless there be something in the subject or context repugnant to such construction'."

If, as appellees contend, the Missouri courts were authorized to construe Section 43, since it is a statute and regarded by this Court as a statute of the State of Missouri, as pointed out in *Hauenstein* v. *Lynham*, 100 U. S. 483, l. c. 490:

> "It must always be borne in mind that the Constitution, laws and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution. This is a fundamental principle in our system of complex national polity."

It was therefore the duty of the state court to construe the word "party" as applicable to appellant in each and every capacity in which she was a party, even though this necessitated treating Mrs. Moffett in her various capacities as present in court in plural capacities.

I.

The judgment dismissing appellants' case (406-407) deprived appellants of the benefit of Revised Statutes 1979, 1980 and 1981, and of the constitutional rights they were designed to enforce, and was rendered without notice, evidence, hearing or jurisdiction so to do, so that the application of Section 948, R. S. Mo. 1939, made said statute a legislative act inflicting punishment without a judicial trial, in violation of Section 10 of Article I of the Constitution.

In an endeavor to defeat the jurisdiction of this Court, appellees, on page 29 of their Suggestions Opposing Jurisdiction (978), have made the following unfounded statement:

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"The self-serving statements of counsel inserted in the record at page 406 and quoted by appellants on page 14 of their Jurisdictional Statement to the effect that these demurrers were sustained 'without notice thereof for hearing or jurisdiction so to do' are disproved by the record itself."

The record recital on page 406 thus attacked is as follows:

"And at the same time, and as a part of the same proceeding and order sustaining said alleged demurrers, said circuit court, without any evidence having been offered to sustain same, and without notice thereof or hearing or jurisdiction so to do, made and entered the following order and judgment in said court and cause:"

Appellees had full opportunity to question the truth of said recital, or any other recital in the abstract, by filing a counterabstract, as provided in Section 1194, R. S. Mo. 1939. They did file a counterabstract, unsuccessfully seeking to question another recital in said abstract, but they never questioned the recital on page 406 in their counterabstract. The recital, therefore, was and is conclusive on the parties and the court, for the reason given in *Eliot* v. *Railroad*, 204 Mo. 1, l. c. 12-13:

"Plaintiff, in filing an additional abstract to supply matters omitted in defendant's abstract, must be considered as having waived any other objection to it than as indicated in the additional abstract; and as the abstract shows that the bill of exceptions was duly filed and also states what the record shows, it is conclusive, in the absence of a counterabstract showing to the contrary." (*Lumber Company* v. *Knights of Pythias, supra; Martin* v. *Castle*, 182 Mo. 216.)

This federal question was raised in the Supreme Court of Missouri by assignments of error I, II, III, V and XXII (945-948). Said assignments were considered and decided against appellants by the State Supreme Court, as shown by its judgment affirming that of the circuit court and, among other things, by the following recital in the opinion (820):

> "Appellants claim error under twenty-two numbered assignments, some being mainly a repetition of others. We have considered all of these assignments, but see no useful purpose in discussing each one separately."

II.

Said unfounded statement of appellees is conclusively contradicted by the record proper and bill of exceptions by recitals other than that attacked by appellees.

The following quotations are from the record proper:

> "Now on this day, by leave of court, plaintiff amends her fifth amended petition by withdrawing and striking out paragraph 45 on page 103, as per amendment filed herein." (l. c. 398.)

> "And now by leave of court, each of the defendants refile their separate demurrers to plaintiffs' fifth amended petition as their separate demurrers to plaintiffs' fifth amended petition as amended." (l. c. 400.)

> "That after the said petition was so amended plaintiffs requested, as shown by that part of this abstract consisting of the bill of exceptions at pages 410 to 427 thereof, that, since the petition was a new petition due to the amendment thereof, plaintiff was entitled to two days' notice of the presentation of demurrers thereto in the following language:
> '* * * since the petition has just been amended and they have just filed their demurrers under the rules

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of the court, I believe we have a right to—I don't want to be taking any technical advantage, but I think it is my duty to the plaintiff to suggest that we are entitled to two days' notice, because there is a new question in the case, it is a new petition.'
"to which the court responded:
'I do not intend to make any such ruling as that.'"
(l. c. 400.)

Thereafter, without any intervening proceeding, the record proper shows that the court entered its order sustaining the four separate demurrers of the appellees to the fifth amended petition *as amended,* and as a part of the same order the record shows:

"And now on this 30th day of December, 1944, the separate demurrers of the respective defendants, Commerce Trust Company, Helen Weede, B. C. Howard and Wm. H. Kopp, to the fifth amended petition of the plaintiffs, as amended, *having been sustained by the court upon the ground that there is a misjoinder of parties plaintiff* named in said petition, and the plaintiffs having excepted to the action of the court in sustaining said demurrer on said ground.

And upon the record *and from suggestions of counsel for said defendants now appearing,* the court finds that a third petition of the plaintiffs has been found insufficient *upon said ground,* and that the said defendants are entitled to have plaintiffs' action dismissed as to them and to recover treble costs within and pursuant to the provisions of Section 948, Revised Statutes of Missouri, 1939.

It is therefore ordered by the court that this cause be and the same is hereby assigned to Division No. 6 of this court, the division designated as the Assignment Division of this court under the rules thereof, to which findings and order plaintiffs and each of them except.

(Signed) A. A. Ridge." (l. c. 401-402.)

The next entry is:

"And at the same time, and as a part of the same proceeding and order sustaining said alleged demurrers, said Circuit Court, without any evidence having been offered to sustain same, and without notice thereof or hearing or justification so to do, made and entered the following order and judgment in said court and cause:

In the Circuit Court of Jackson County, Missouri, at Kansas City. Division No. Six.

Louise McGrew Moffett and Louise McGrew Moffett as Executrix of the Estate of Thomas S. Moffett, Deceased, Plaintiffs,

vs.

Commerce Trust Company, a Corporation, Helen Weede, B. C. Howard and William H. Kopp, Defendants.

No. 479103.

Judgment Entry.

"Now on this 30th day of December, 1944, it appearing to the court that a third petition of the plaintiffs has been found insufficient upon the ground that there is a misjoinder of parties plaintiff herein, and that the above named defendants are entitled to have plaintiff's action dismissed by reason thereof and to recover treble costs within and pursuant to the provisions of Section 948 of the Revised Statutes of Missouri, 1939.

It is therefore ordered, adjudged and decreed by the court that this cause be and the same is hereby dismissed as to each and all of the above named appearing defendants, and that defendants have and recover of and from plaintiffs treble costs and have therefor execution.

To which finding and judgment of the court plaintiffs and each of them except.

A. A. Ridge." (l. c. 406-407.)

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The foregoing is the abstract of the record proper. The bill of exceptions more completely establishes the same facts and circumstances (420-425). That bill shows that appellants, through counsel, requested permission to amend the fifth amended petition by withdrawing and striking therefrom paragraph 45 thereof, and that on the making of said request the following occurred:

> "The Court: That will be granted.
>
> Judge Goodrich: The defendant Commerce Trust Company requests to refile its demurrer to the fifth amended petition, already refiled as to the fifth amended petition as amended, as against the fifth amended petition as now amended.
>
> The Court: Let me save the record for all of you. Leave will be granted to the plaintiff to amend the petition by striking out that portion of the petition requested by counsel for plaintiff. Each of the defendants are given leave to refile their demurrers to the fifth amended petition as amended.
>
> Mr. Harding: And said demurrers are refiled, shall we so consider?
>
> The Court: Yes." (l. c. 420.)

Amongst other matters referred to are the following by court and counsel:

> "Mr. O'Donnell: * * * it is our duty to call attention to the fact that now that the petition has been amended * * * then we respectfully suggest that the matter be held until the court has a chance to look into the whole proposition, and make up its mind as to whether or not the petition states a cause of action. Also, since the petition has just been amended and they have just filed their demurrers under the rules of the court * * * we are entitled to two days notice, because there is a new question in the case, it is a new petition.
>
> The Court: I do not intend to make any such ruling

as that. It does seem rather futile to me to have made up my mind on this one point, which was so apparent to me in this case from the pleadings, when I asked for the briefs, to have additional number of days arguments and submission of briefs here. I understand counsel for defendants are willing to rely upon this one ground that is stated in their demurrer.

Judge Goodrich: We think that ground is well taken.

The Court: I am going to make an order sustaining the demurrer on that one ground.

Mr. O'Donnell: In view of the fact that the court has indicated his notion without announcing the ruling—

The Court: I have announced my ruling already, that I am sustaining the demurrers on the ground of misjoinder of parties plaintiff.

To which ruling and action of the court the plaintiffs by their counsel at the time duly excepted and still except." (l. c. 421.)

The record thus recites that Judge Ridge granted appellants' request to amend the fifth amended petition, and the fifth amended petition was so amended (398-399). When the amendment was made, the fifth amended petition as amended was a different petition from the fifth amended petition, and the fifth amended petition was as fully abandoned by appellants as the preceding petitions, which had been abandoned by the filing of amended petitions. The fifth amended petition *as amended* was, in legal contemplation, as separate and different a petition from the fifth amended petition as the fifth amended petition was different from and separate from the third or first amended petitions or the original petition.

The elimination of paragraph 45 from the fifth amended petition removed the ground of objection to the fifth amended petition relied on by appellees and indicated

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in *Kammeyer* v. *City of Concordia*, 352 Mo. 742. The petition in that case alleged that five plaintiffs were injured by 32 fraudulent overt acts pursuant to a conspiracy by defendants there. A demurrer to the petition in that case was sustained, and the petition dismissed by the trial court. On appeal the Supreme Court ruled that since the pleading disclosed that two of the five joint plaintiffs did not sustain any damage, and three did, that the judgment must be reversed and the case remanded "with directions to sustain the demurrer as to plaintiffs Lindemann and Hartwig and overrule the demurrer as to all of the other plaintiffs."

When this situation developed in the case at bar, and appellants requested permission to amend the fifth amended petition by withdrawing and striking out the objectionable paragraph, the circuit court recognized the propriety of the request and granted leave to amend, and thus changed the issue to be determined on demurrer with reference to the unfounded allegation of misjoinder of parties. The court thereupon granted appellees' request for leave to refile their demurrers, not to the fifth amended petition but as stated by appellees' counsel "to the fifth amended petition as amended, as against the fifth amended petition *as now amended*" (420).

The sole basis for the demurrer from appellees' viewpoint was thus removed from the fifth amended petition, and thereafter the fifth amended petition *as amended* was the pleading before the court. Each demurrer was sustained to the "fifth amended petition *as amended*" (401). Consequently, since it was a new petition, the appellees recognized that it was necessary for them to proceed upon it as though no action had hitherto been taken with reference to any preceding petition in the case.

Hence they refiled their demurrers, and then, even had appellants made no request for the enforcement of jurisdictional Rule 29 (402-403), the court lost all jurisdiction to pass upon the demurrers on December 30, 1944 (*Meierhoffer* v. *Hansel*, 294 Mo. 195). The appellees lost all right to have the demurrers to the fifth amended petition sustained, and the court had no jurisdiction to pass on the demurrers to that petition as amended on December 30, 1944.

Rule 29 (402-403) is:

> "Orders in a cause in the assignment division to which a party is not entitled upon the pleadings shall be granted only when they are consented to in open court, or in writing by counsel upon the opposite side, and filed in the cause, or upon a motion duly filed. Upon the filing of such a motion or of any demurrer, the party filing the same shall, on the day of the filing, cause to be served upon the opposite party or his attorney, a notice to the effect that such a motion or demurrer will be called up for hearing on a day, in such notice to be named, which shall be not more than ten nor less than two days, after such filing. Upon the day of filing such motion or demurrer, proof of service of such notice shall be deposited with the clerk of the assignment or other division in which such filing is made.
>
> Failure to comply with this rule shall be sufficient ground, in the discretion of the court, for striking from the files the motion or demurrer so filed.
>
> Provided that this rule shall not prejudice the right of the opposite party to serve notice to call up such motion or demurrer at a day earlier than the day named by the moving party."

The Supreme Court of Missouri had always heretofore held that without compliance with such rules the circuit

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court was without jurisdiction to make orders or render judgments. In *Meierhoffer* v. *Hansel*, 294 Mo. 195, at l. c. 205, the Missouri Supreme Court said:

> "IV. The trial judge recognized the lack of jurisdiction in the Assignment Division, and therefore attempted at the conclusion of the trial and after his decree had been entered to correct all questions of jurisdiction by causing the record to show that same had been assigned to himself as Judge of Division No. 1, and that it was an oversight that the order was not made preliminary to the trial.
>
> Following this assumption to its logical conclusion and considering the rules of the court invoked by appellant, we must hold that the appellant was entitled to have all preliminary matters settled in the Assignment Division and the cause put at issue for a trial. Moreover, he was entitled to have a call made for a listing of his case and a publication of notice thereof, and he was entitled to have said cause listed and an assignment regularly made after such listing to one of the judges of the several divisions of the Circuit Court at Kansas City. In addition to this he should have had his opportunity to exercise his right under Section 1357, Revised Statutes 1919, with respect to the matter of taking a change of venue from the judge of the division to which his cause might have been assigned. Moreover, he should have had an opportunity to present the evidence of witnesses other than mere informal or *ex parte* affidavits.
>
> It is apparent that the constitutional rights of the appellant were violated, as the processes of the law were not permitted to operate in his behalf, and the privileges and benefits of the law were denied to him."

The statement in the foregoing opinion to the effect that "Moreover, he (appellant) should have had an opportunity to present the evidence of witnesses other than

mere informal or *ex parte* affidavits" could be transposed in this case to apply to the record entry (401) reciting that

> "* * * upon the record *and from suggestions of counsel for defendants now appearing,* the court finds that a third petition of the plaintiffs has been found insufficient upon said ground" (misjoinder of parties plaintiff),

which evidence would have shown that the demurrers sustained by Judge Wright to the third amended petition was by a general order (152), generally sustaining the demurrers as to all grounds therein set forth, including the finding that the petition did not state a cause of action under the Civil Rights Act (Sections 1979-1981), and also the following from the opinion of Judge Wright:

> "Plaintiff contends that the conspiracy alleged violates the Federal statutes giving a cause of action for the deprivation of any rights, privileges or immunities secured by the Constitution and laws, and contends that this issue was not in the Kansas cases. I am persuaded that plaintiff's Petition does not state a cause of action under the statutes relied upon, and I am further convinced that even though the acts alleged would constitute a cause of action under the Federal statutes, yet the overt acts or matters and things about which plaintiff complains have been tried and determined and cannot now be relitigated as a basis of a cause of action."

which circumstance establishes that Judge Wright expressly held that "plaintiff's petition does not state a cause of action under the statutes (Federal) relied upon." And appellants were also entitled to offer any evidence and call attention to the record before Judge Buzard, showing that Judge Buzard had overruled the separate

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demurrer of appellee Kopp, and that appellee Kopp had then filed a motion to make definite and certain, and that no demurrer by Kopp was pending when Judge Terte sustained a non-pending demurrer for Kopp (60-61); and that no demurrer by any other appellee was lawfully pending because Judge Buzard had overruled motions by the other three defendants seeking to have the first amended petition stricken out because of the addition of Mrs. Moffett as executrix as party plaintiff—in other words, on the alleged ground of misjoinder of parties plaintiff.

So that Judge Ridge was without jurisdiction to apply Section 948 R. S. Mo. 1939 because, under the law, he was not authorized to count the void orders made by himself and Judges Terte and Wright when he made his finding of fact and rendered the penal judgment dismissing the case as to each and all of the defendants, and assessing treble costs against appellant.

The general orders of Judges Terte and Wright purporting to sustain demurrers to previous petitions were not restricted to total elimination of any decision of federal questions by the trial court. Said orders and the record, supplemented by the opinion of Judge Wright, shows that federal questions involved herein were decided by Judge Wright. Since said suggestions of counsel were accepted by Judge Ridge as one of the jurisdictional bases of his judgment applying Section 948, then it appears from the record that federal questions here involved were decided and were implicit in the judgment of the Circuit Court, and its affirmance by the Supreme Court was a decision by that court also affirming that of Judge Wright, deciding that appellants pleading did not state a cause of action under the civil rights acts. (R. S. 1979, 1980, 1981.

It thus appears that the finding of fact, based in part on the "suggestions of counsel" for appellees (401), seeking to eliminate from the record a decision on the federal questions involved, were "suggestions" which were the unfounded basis of Judge Ridge's finding of fact. And, to use appellees' language as applied to the recital at page 406, showing lack of notice and jurisdiction, said "suggestions of counsel for said defendants now appearing" are "disproved by the record itself."

The only purpose served by them in this case is to establish conclusively the fact that Judge Ridge delegated his judicial duties to appellees' counsel and that "the functions of the judge were abdicated" etc. (*Ensminger* v. *Powers*, 108 U. S. 292; *Kelly* v. *Town of Milan*, ~~223~~ Fed. 842).

Appellees, appreciating the fact that Judge Ridge did not conform to judicial standards in his acts on December 30~~26~~, 1944, with reference to a full hearing of the questions presented, seek to escape their effect by said unfounded charge, claiming that because hearings were had on the original, third and fifth amended petitions, that no hearing was necessary with reference to the fifth amended petition as amended, nor necessary with reference to the part of their demurer consisting of motions, nor necessary before Judge Ridge undertook to act and render a final judgment. But the foregoing record discloses the acts of Judge Ridge in this case come within the condemnation of the opinion in *Morgan* v. *United States*, 304 U. S. 1, when it reversed the tribunal below and when it used the following language, l. c. 18:

> "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party

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and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one."

And at 19-20:

> "Congress, in requiring 'a full hearing,' had regard to judicial standards, * * * not in any technical sense, but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature. If in an equity cause a special master or the trial judge permitted the plaintiff's attorney to formulate the findings upon the evidence, conferred *ex parte* with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing."

So that the concrete question thus raised for determination here is whether or not the record, or appellees' statements contradicted by said record, will constitute the basis for its decision on this question.

The foregoing conclusively establishes that the application of Section 948, R. S. Mo. 1939, inflicting the punishment therein provided, was unlawfully inflicted upon appellants, without trial, hearing or jurisdiction so to do, and establishes that such section, as applied, "is a legislative act which inflicts punishment without a judicial trial."

The foregoing considerations destroy every contention made in appellees' suggestions and necessitate the denial of its motion to dismiss or affirm.

Judge Ridge was without jurisdiction to assign the case to his own Division 6 for final disposition without complying with the rules of the court (402-407).

The law of the State as declared on this question in *Meierhoffer* v. *Hansel*, 294 Mo. 195, at l. c. 205, is:

> "* * * he was entitled to have a call made for a listing of his case and a publication of notice thereof, and he was entitled to have said cause listed and an assignment regularly made after such listing to one of the judges of the several divisions of the Circuit Court of Kansas City. In addition to this *he should have had his opportunity to exercise his right under Section 1357, Revised Statutes 1919, with respect to the matter of taking a change of venue from the judge of the division to which his cause might have been assigned.*"

Judge Ridge had no jurisdiction after the case got into his division to take any action, until appellants were duly notified and had an opportunity to take a change of venue if they so desired.

Section 1357, R. S. Mo. 1919, referred to in said opinion, carried forward in the 1929 revision as Sec. 907, and in the 1939 revision as Section 1058.

So that the same statute and the same law was in force on December 30, 1944, as were in force when the Meierhoffer case was decided. Said statute is as follows:

> "Sec. 1058. A change of venue may be awarded in any civil suit to any court of record, for any of the following causes: First, that the judge is interested or prejudiced, or is related to either party, or has been of counsel in the cause; second, that the opposite party has an undue influence over the mind of the judge; third, that the inhabitants of the county are prejudiced against the applicant; fourth, that the

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opposite party has an undue influence over the inhabitants of the county; but in no case shall more than one change be granted either party."

The recital in the record (406) that

"as a part of the same proceeding and order sustaining said alleged demurrers"

that court made the record entry shown in the record as to the finding of fact and judgment is substantiated by the physical facts shown in the record.

And the fact that, in making his finding of fact he placed the responsibility therefor on the counsel for appellees absolutely demonstrates that he abdicated his judicial function and so his order applying Section 948 and dismissing the case was an order made without jurisdiction, and was a void order.

Had appellants only known what the judge purported or intended to do, so as to deprive appellants of the Code which went into effect the next court day, and which repealed the statute authorizing demurrers, they could have prevented his acts by taking a change of venue, and further deprived Judge Ridge of jurisdiction to apply said Section 948, which, according to the opinion herein discussing it, was also repealed. The opinion says (826):

"This statute, *until the effective date of our new Code,* was in force for one hundred and twenty years."

The act of Judge Ridge in denying appellants the benefit of Rule 29 (402), and the recital in his finding of fact entered therein, before he assigned the case to his own division, that it was in part based (424) "upon the suggestions of counsel for said defendants now appearing"

was absolute proof that the second ground of the change of venue statute, to-wit: "that the opposite party has an undue influence over the mind of the judge," are considerations which demonstrate what the recital on page 406 of the record declares, to-wit: that Judge Ridge applied Section 948 without "evidence, hearing, or jurisdiction so to do," and that he delegated his judicial functions to counsel for appellees. *Ensminger* v. *Powers*, 108 U. S. 292, l. c. 298-301, *Kelly* v. *Town of Milan*, 21 Fed. 842. And so, in every conceivable sense, the manner of its application made Section 948 a mere bill of attainder, and such circumstances contradict the recital in the opinion of the State Supreme Court that said statute was a statute which "inflicts no penalty without a hearing." (826.)

It may be that, in the abstract, the statute meant just that, but, as applied herein, it inflicted the penalty provided in it without any hearing or opportunity to appellants to be heard. It was this unlawful application of said Section 948 that frustrated the power of either the Circuit Court or the Supreme Court to give appellants any relief under R. S. U. S. 1979, 1980 and 1981, or to award any damages for the deprivation of all the constitutional rights referred to in the record herein, and was the basis of the unlawful denial by the state courts of said federal rights.

It may aid in the solution of the question if, in addition to pointing out that Judge Ridge, in violation of the court rule and the statute which bound him, and without jurisdiction, trial or hearing, used the last hours of the life of Section 948 to destroy appellants' federal rights.

We have this further question in the case, to-wit: Judge Ridge declared (422):

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"If the defendants are not insisting on those other grounds, I will just overrule the other grounds of the demurrer."

By said statement it is apparent that Judge Ridge believed that appellant in both capacities had a cause of action for a violation of her federal rights under the said Civil Rights Act, and that appellees knew that he had come to that conclusion. Yet Judge Ridge, without right or authority so to do, rendered a judgment on the merits under the Swing case against appellant, forever forfeiting her right to recover for the injury resulting from such violation of her federal rights. And the State Supreme Court by its findings that appellants were not denied due process and that the petition did not state a cause of action ended the litigation and prevented any further action.

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III.

The constitutional provision prohibiting the passing of bills of attainder by states was violated by the Missouri State Courts in their application of Section 948, R. S. Mo. 1939, without notice, evidence, trial or jurisdiction, so that, as applied by the judgment, said Section 948 was a mere legislative act which herein inflicted punishment without a judicial trial, and was therefore repugnant to said constitutional provision.

The fact that a tribunal and a process were appointed by the legislature to execute the sentence of the statute does not take away its vice. For, as stated in *State* v. *Julow*, 129 Mo. l. c. 174, quoting Comstock, J., in *Wynehamer* v. *People*, 3 Kern. 378, in pointing out that it is not due process of law if "the legislature shall pass a law to effectuate the wrong," l. c. 174:

> "* * * nor will it make any difference, although a process and a tribunal are appointed to execute the sentence. If this is the 'law of the land,' and 'due process of law,' within the meaning of the Constitution, then the legislature is omnipotent. It may, under the same interpretation, pass a law to take away liberty or life without a pre-existing cause, appointing judicial and executive agencies to execute its will. Property is placed by the Constitution in the same category with liberty and life."

The Missouri courts were merely the tribunals which executed the penal sentence of Section 948, R. S. Mo. 1939, without a judicial trial. In *State* v. *Julow*, referring to the prohibition of the XIVth Amendment, at l. c. 172 it is further said:

> "* * * it will be noted that the rights of life, liberty and property are grouped together in the same sentence; they constitute a *trinity of rights*, and each as opposed to unlawful deprivation thereof, is of equal constitutional importance. With each of these rights, under the operation of a familiar principle, every auxiliary right, every attribute necessary to make the principal right effectual and valuable in its most extensive sense, pass as incidents of the original grant. 'The rights thus guaranteed are something more than the mere privileges of locomotion; the guarantee is the negation of arbitrary power in every form which results in a deprivation of a right.'
>
> These terms, 'life,' 'liberty,' and 'property,' are representative terms and cover every right to which a member of the body politic is entitled under the law."

It thus appears that every right which a person has is secured by the Constitution, and that even in Missouri the fact that a legislative act is applied to deprive any

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person of rights so secured is not cured because a process and a tribunal are provided to inflict the punishment provided in the legislative judgment. Neither nor both the legislature and the judges of Missouri have the power attributed to the highest court in England by Coke when he said that its power and jurisdiction is "so transcendent and absolute that it cannot be confined either for causes or persons within any bounds" (Coke's Inst., Part Four, p. 36).

Neither the Circuit Court nor the State Supreme Court, in this case, deemed themselves confined, either for the causes of action set forth in the petition or the persons of appellants, within any bounds. And so their acts, in applying Section 948, were acts which could not be justified because their power and jurisdiction under the law is not "so transcendent and absolute that it cannot be confined, either for causes or persons, within any bounds."

Therefore Section 948, as applied, was a bill of attainder from the viewpoint expressed in both opinions in *United States* v. *Lovett*, 90 Law Ed. 1052. The concurring opinions point out that the safeguards in the Constitution with reference to bills of attainder

> "• • • were not defined by the Constitution. They were defined by history. Their meaning was so settled by history that definition was superfluous. Judicial enforcement of the Constitution must respect these historic limits." (l. c. 1062.)

> "'Upon this point a page of history is worth a volume of logic.'" (l. c. 1063.)

In Coke's discussion of the highest court in England, 4th Inst., he appends some historical examples to illustrate the iniquity of bills of attainder in the days of the Henrys.

Those examples, in a legal sense, were no more iniquitous than the application in this case of Section 948. Said Coke, l. c. 37:

> "And albeit I find an attainder by parliament of a subject of high treason being committed to the tower, and forth-coming to be heard, and yet never called to answer in any of the houses of parliament, although I question not the power of the parliament, for without question the attainder standeth of force in law: yet this I say of the manner of the proceeding, *Auferat oblivio, si potest; si non, utcenque silentium tegat*: for the more high and absolute the jurisdiction of the court is, the more just and honorable it ought to be in the proceeding, and to give example of justice to inferiour courts. But it is demanded, since he was attainted by parliament, what should be the reason that our historians do all agree in this, that he suffered death by a law which he himself had made. For answer hereof, I had it of Sir Thomas Gawdye knight, a grave and reverend judge of the kings bench, who lived at that time, that king H. 8 commanded him to attend the chiefe justices, and to know whether a man that was forth-coming might be attainted of high treason by parliament, and never called to his answer. The judges answered, that it was a dangerous question, and that the high court of parliament ought to give examples of inferiour courts for proceeding according to justice, and no inferior court could do the like; and they thought that the high court of parliament would never do it. But being by the express commandement of the king, and pressed by the said earle to give a direct answer: they said, that if he be attainted by parliament, it could not come in question afterwards, whether he were called or not called to answer. And albeit their opinion was according to law, yet might they have made a better answer, for by the statutes of Mag. Cart. ca. 29. 5 E. 3 cap. 9. & 28 E. 3. cap. 5. No man ought to be condemned without answer, &c. which

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they might have certified, but *facta tenent multa, quae fieri prohibentur;* the act of attainder being passed by parliament, did bind, as they resolved. The party against whom this was intended, was never called in question, but the first man after the said resolution, that was so attainted, and never called to answer, was the said earl of Essex; whereupon that erroneous and vulgar opinion among our historians grew, that he died by the same law which he himself had made." The rehearsal of the said attainder can work no prejudice, for that I am confidently persuaded, that such honourable and worthy members shall be from time to time of both houses of parliament, as never any such attainder, where the party is forth comming, shall be had hereafter without hearing of him.

But Coke's opinion is shown to be valueless by this record for in this case the callous example set by some of our English ancestors was followed. He further says:

"Doth our law judge any man, before it hear him and know what he doth? It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him.

* * * * * *

And the conclusion is after hearing and discerning the cause, consider, consult, and then give sentence.

And as evil was the proceeding in parliament against Sir John Mortimer, third son of Edmond the second earl of March (descended from Lionell duke of Clarence) who was indicted of high treason for certain words, in effect, that Edmond earl of March should be king by right of inheritance, and that he himself was next rightful heir to the crown after the said earl of March; wherefore if the said earl would not take it upon him, he would; and that he would go into Wales, and raise an army of 20,000

men, &c., which indictment (without any arrangnment or pleading) being meerly faigned to blemish the title of the Mortimers, and withal being insufficient in law, as by the same appeareth, was confirmed by authority of parliament; and the said Sir John being brought into the parliament without arraignment or answer, judgment in parliament was given against him upon the said indictment; that he should be carried to the tower of London, and drawn through the city to Tiborn, and there hanged, drawn and quartered, his head to be set on London bridge, and his four quarters on the four gates of London, as by the record of parliament appeareth."

Hallam, in Volume I Constitutional History of England, pages 43-46, discusses the same and similar precedents as follows:

"Cromwell, a man not destitute of liberal qualities, but who is liable to the one great reproach of having obeyed too implicitly a master whose commands were crimes, inquired of the judges whether, if parliament should condemn a man to die for treason without hearing him, the attainder could ever be disputed. They answered that it was a dangerous question, and that parliament should rather set an example to inferior courts by proceeding according to justice. But being pressed to reply by the king's express commandment, they said that an attainder in parliament, whether the party had been heard or not in his defense could never be reversed in a court of law. No proceedings, it is said, took place against the person intended, nor is it known who he was. But men prone to remark all that seems an appropriate retribution of Providence, took notice that he who had thus solicited the interpreters of the law to sanction such a violation of natural justice, was himself its earliest example. In the apparent zenith of favor this able and faithful minister, the king's vice-

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gerent in his ecclesiastical supremacy, and recently created earl of Essex, fell so suddenly, and so totally without offence, that it has perplexed some writers to assign the cause. But there seems little doubt that Henry's dissatisfaction with his fourth wife, Anne of Cleves, whom Cromwell had recommended, alienated his selfish temper, and inclined his ear to the whisperings of those courtiers who abhorred the favorite and his measures. An act attainting him of treason and heresy was hurried through parliament, without hearing him in his defence. The charges, indeed, were so ungrounded that had he been permitted to refute them, his condemnation, though not less certain, might, perhaps, have caused more shame. This precedent of sentencing men unheard, by means of an act of attainder, was followed in the case of Dr. Barnes, burned not long afterwards for heresy."

Note 1 says, l. c. 45:

"1 Coke's 4th Institute, 37. It is however said by lord Herbert and others that the Countess of Salisbury and the Marchioness of Exeter were not heard in their defense."

According to the judges, even of that distant and barbarous age, the variety of attainder above described was unjust and their opinion necessitates reversal herein. Its infliction upon the Countess of Salisbury and the Marchioness of Exeter mentioned is paralleled only by the treatment inflicted on appellants herein and inflicted on Mrs. Moffett and her sister in the Kansas litigation. For, it appears in the opinion in the Howard fee case, 345 Mo. 741, that while Mrs. Clark was the duly appointed administratrix of the Moffett Brothers partnership estate in Kansas and, as such, of course in legal possession of the assets thereof and the only person authorized to defend, yet that she was not a party as administratrix of said estate to the suit in Kansas, where Commerce

Trust Company and Mr. Howard represented conflicting interests. Yet the Kansas district judge rendered a judgment against her, though Mrs. Clark as administratrix of Moffett Brothers estate was not a party to the suit in his court in the capacity in which he rendered a judgment against her and in which, as such, Mrs. Clark was prevented from making the defense that she could have made had she been a party as such administratrix—and in rendering a judgment also against Commerce Trust Company, at its request; though it was not a Kansas administrator and though it had no possession of assets of said estate in Kansas, pursuant to which said Commerce Trust Company trespassed upon the assets in the legal possession of Mrs. Clark and as such administrator took them for the ostensible purpose of paying the fraudulent judgment. Among many other wrongs, said district court later credited the value of the Kansas lands of Moffett Brothers as $99,700.00 in 1934-1935 (243), when it became necessary to get as much as possible into the estate of John Moffett for the benefit of the confederates. And when it became necessary to accomplish another purpose in making an order of distribution, though the value had not changed, as he well knew, the said judge made an order disposing of the lands in 1936-1937 at $181,873.98 (243), or at about twice the amount for which they were fraudulently credited on the fraudulent judgment.

All these, and other, facts appeared in the fifth amended petition as amended (154-323), yet the Supreme Court of the state decided that appellants were accorded due process (827) and thereby established that Section 948, as applied by Judge Ridge and affirmed by said State Supreme Court, was a true bill of pains and penalties, and that the judgment resulting from its application can not properly remain unreversed.

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The counsel whose suggestions resulted in the erroneous finding of fact by Judge Ridge seek to cause this Court to believe that only one federal question was raised and decided by the State courts. But the opinion of Judge Clark expressly points out that all the federal questions set up by assignments of error in that court were considered and decided (820).

And so, in a legal sense, the treatment accorded appellants by the Circuit and Supreme Courts of Missouri, in this case, in disposing of her rights without notice, evidence, trial or jurisdiction, operated to make Section 948, as pleaded, a bill of pains and penalties, or attainder, within the meaning of the historical precedents referred to by Coke and Hallam.

Section 948, R. S. Mo. 1939, is also a bill of attainder measured by the standard applied in the opinion of the court in *United States* v. *Lovett,* 90 Law Ed. 1052, l. c. 1058-1059. There this Court held that a bill of attainder, or of pains and penalties, is a legislative act which inflicts punishment without a judicial trial.

Section 948 was thus applied under the record as disclosed in the foregoing statement. Hence the law in the opinion as follows applies:

> "We hold that Sec. 304 falls precisely within the category of Congressional actions which the Constitution barred by providing that 'No bill of attainder or *Ex Post Facto Law* shall be passed.' In *Cummings* v. *Missouri,* 4 Wall. (U. S.) 277, 323, 18 L. Ed. 356, 363, this court said, 'A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties'."

Speaking of *Cummings* v. *Missouri*, 4 Wall. 277, 32
and *Ex Parte Garland*, 4 Wall. 333, this Court said:

> "Neither of these cases has ever been overruled
> They stand for the proposition that legislative act
> no matter what their form, that apply either t
> named individuals or to easily ascertainable member
> of a group in such a way as to inflict punishment o
> them without a judicial trial are bills of attainde
> prohibited by the Constitution. Adherence to thi
> principle requires the invalidation of Sec. 304. We d
> adhere to it."

IIIa.

The foregoing authorities showing that Section 948, a
applied, constitutes a bill of pains and penalties, is ap
plicable to the partnership administration statutes, an
especially Sections 86, 87 and 88 thereof, and demonstrat
that said sections are repugnant to the bill of attainde
prohibition of Section 10 of Article I from any poi
from which said partnership administration statute ma
be examined. For said statutes are not statutes whic
could be held valid in the abstract. They are a me
legislative decree which provides for the infliction
punishment, and the court referred to in Section 88
merely a tribunal of the variety described by Judge Co
stock, as quoted in *State* v. *Julow*, 129 Mo., l. c. 174,
above quoted.

Said partnership administration statutes are repu
nant, not only to the bill of attainder provision of th
Constitution, but also to Article III of the Treaty wi
France of 1803. And said Treaty, whether it becam
obsolete or not, having created rights in the inhabitan
of Louisiana to the protection of the Vth Amendmen
had performed its function as far as this partnership

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concerned and must be respected by the courts, under the decision of Chief Justice Marshall in *Chirac* v. *Chirac*, 2 Wheat. 259, where, at l. c. 277, it is said:

> "If a treaty or any other law has performed its office by giving a right, the expiration of the treaty or law cannot extinguish that right * * * the court if of opinion that the treaty had its full effect the instant a right was acquired under it; * * * and that its expiration or continuance afterwards was unimportant."

See

Geoffrey v. *Riggs*, 133 U. S. 258.
Pollock v. *Gibbs*, 14 Pet. 353.

And, of course, said partnership administration statutes are also void, as pointed out in the jurisdictional statement, because in conflict with the XIIIth and XIVth Amendments.

And so the application of Section 948 deprived appellants of the rights secured by Article III of said Treaty, and the XIIIth and XIVth Amendments, all of which were referred to in the fifth amended petition as amended, and their protection denied by the state court by its application of Section 948.

IV.

Appellees claim (968), in their point II on page 19, that

> "There is no provision of the Constitution or Statutes of the United States which gives the appellants the right to maintain *jointly* in the courts of Missouri, the instant suit."

They also say that (968):

> "• • • there was no decision against the validity of Sections 1979, 1980 and 1981, U. S. R. S. (Secs. 43, 47 and 48, Title 8, U. S. C.) or against the right of either appellant to maintain an action thereunder."

Appellees say that the fact that the court ruled that appellants could not recover in both capacities, and its refusal, at appellees' request, to rule whether plaintiff could recover in either capacity, did not deny any federal right. However, the state court did not give any effect to any federal right vested in appellant in either capacity, or in both capacities. So, the failure of the court to enforce appellants' admitted federal rights was a denial thereof by the state court. And the question is whether a state court can deny federal rights to one or more plaintiffs who could have said federal rights vindicated in the federal courts.

We direct attention to the fact that this Court, in *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 119, in a diversity case based on state law said, l. c. 108-109:

> "Here we are dealing with a right to recover derived not from the United States, but from one of the states. When, because the plaintiff happened to be a nonresident, such a right is enforceable in a federal as well as in a state court, the forms and modes of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic. But since a *federal court* adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect *only another court of the state,* it cannot afford recovery if the right to recover is made unavailable by the state, nor can it substantially affect the enforcement of the right as given by the state."

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The principle above stated could never have been applied by this Court in that case were it not for the principle authorized by *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. And so, likewise, when a state court sitting in any state is adjudicating a question of federal right, the state court is, for that purpose, *only, another federal court.*

In *Montgomery & Atl. Motor F. L.* v. *Morris*, 8 So. (2d) 502, at l. c. 504, it is said:

> "Where a federal question is involved, the state courts in passing on it are federal courts in addition to being state courts, and their decisions are reviewable by the Supreme Court of the United States."

Appellees contend (971) that the Civil Rights Act, R. S. 1979, did not authorize any person or entity to bring a suit to enforce the liability there provided for. They say that that question was not settled by the Act of Congress, but that that question must be ascertained by reference to the laws of Missouri rather than to the Act of Congress and the Constitution. But the section itself contradicts the contention. Appellees are liable because they subjected "any citizen of the United States or other person within the jurisdiction thereof" to the alleged deprivations.

This Court has held that the word "citizen," in Section 1 of the XIVth Amendment does not limit the meaning of the word "person" to citizens, but it has been held by this Court that any kind or variety of person, artificial, Chinese, natural, or otherwise, is a person within the meaning of the XIVth Amendment. Since Section 43 is based on the XIVth Amendment, the words "or other person" includes an administrator of an estate. And when the legislature came to provide how there could be a

recovery, it provided that every person thus subjecting such citizens or persons to said deprivations "shall be liable to the party injured." The word "party," as used in Webster's Dictionary, may include more than one, and usually the word party is used to designate more than one person, or one side of a contest.

And, so, Mrs. Moffett is a party, but so in two capacities. Nay, she has more than two in this case. She is the residuary devisee, and in that capacity she is in this case. She is the residuary legatee, and in that capacity she is a party in this case. She is the executrix of her husband's estate, and in that capacity she is a party in this case. And, apart from said capacities, she is also a party to this case as a joint owner individually of the property of which Thomas S. Moffett devised and bequeathed his interest to her (322).

And, so, the statute making appellee liable did not select any capacity, but by its impersonal and all embracing terms provided that for their unlawful acts appellees "shall be liable to the party injured" regardless of the number of capacities in which the party was injured.

The decision of the Supreme Court of Missouri wrote a limitation into said statute, which the Congress did not, and undertook to say that the appellees are not liable to the party injured just because they wronged her in more respects than one.

And when it is taken into consideration that the Congress provided that the appellees "shall be liable to the party injured," not in the abstract but "in an action at law, suit in equity, or other proper proceeding for redress," the intent of Congress is manifest. That intention was to enable the party injured, regardless of the capacity in which the injury was sustained, to enforce the joint liability of appellees in a single action at law suit

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in equity or other proper proceeding in every capacity in which she was injured.

In *State* v. *Blout*, 85 Mo. 543, referred to a statute providing

> "that such prohibition shall not apply to waters wholly on the premises of such person or persons using such devices."

The question was whether that statute applied to waters wholly on the premises of "such person or persons." Said the court, l. c. 546:

> "We are of the opinion that the word persons, as used in the proviso, means joint owners."

Mrs. Moffett, under the allegations, individually was a joint owner of the property with her late husband under the admitted allegations and the decisions of the Supreme Court of Missouri.

Appellees claim that the decision in *Wells* v. *Davis*, 303 Mo. ....., is contrary to appellants' contention because, say appellees, the federal statute there provided that the action should be brought by the administrator of the deceased. But that statute, like Section 1979, merely designated who should bring the action.

Section 43, Title 8 U. S. C., is more complete and definite than that statute, because it specifies to whom the appellees are liable, and provides that they shall be liable to the party injured, not alone in an action at law but in any conceivable kind of an action, or suit, or proceeding, for it says they shall be liable to the party injured at law, in equity, or other proper proceeding for redress.

The claim that because neither state nor federal court is mentioned by the statute providing that the appellees

shall be liable to the party injured applies only to actions in the federal court, and not to actions in the state court, is contradicted by the opinion of this Court in *Stewart* v. *Kahn*, 11 Wall. 493. In that case an act of Congress was involved in a state court providing for limitation of actions in certain cases. In disposing of the contention there made this Court said, l. c. 505-506:

> "But it has been insisted that the Act of 1864 was intended to be administered only in the Federal courts, and that it has no application to cases pending in the courts of the states.
>
> "The language is general. There is nothing in it which requires or will warrant so narrow a construction. It lays down a rule as to the subject, and has no reference to the tribunals by which it is to be applied. A different interpretation would defeat, to a large extent, the object of its enactment. * * * The judicial anomaly would be presented of one rule of property in the Federal courts, and another and a different one in the courts of the state; and debts could be recovered in the former which would be barred in the latter. This would be contrary to the uniform spirit of the national jurisprudence from the adoption of the judiciary act of 1789 down to the present time."

This Court there pointed out that the facts on which its jurisdiction depended were not shown in a bill of exceptions. And this Court there pointed out its own obligation in such a case as this as follows:

> "But enough is shown to develop clearly the action of the Supreme Court of the state, and the point we are called upon to review. There is no controversy as to the facts. Under the circumstances, a refusal on our part to exercise the jurisdiction invoked would involve a sacrifice of substance to form, and unwarrantably defeat the ends of justice."

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And, so, here the record proper is supplemented by the bill of exceptions (410-425), and both point out that the state court undertook to amend the Act of Congress here involved by inserting therein the provision that the party injured could not recover except in such capacities as the judges of the State of Missouri chose, without regard to either the law of the state or of the United States on the question.

Notwithstanding the foregoing circumstances appellees say on page 22 of their suggestions (971), of the Civil Rights Act, that it is an act

> "which vests no specific person or entity with a right o faction as a part of the terms of the statute."

It would seem that if such Civil Rights Act did not vest any right of action, as appellees say, in any "specific person or entity," then nobody is vested with any action to enforce thereunder, either in the state or federal court.

Appellees have thus admitted that they persuaded the State Supreme Court to hold that Section 43, Title 8 U. S. C., is invalid and have admitted that by that act they conferred obligatory appellate jurisdiction of this case on this Court under Section 237a, Judicial Code.

In discussing *Georgia* v. *Pennsylvania R. R. Co.*, 324 U. S. 439, 89 Law Ed. 1050, after vainly attempting to point out distinctions between the principle applied in that case and the applicable principle in this, they say (971):

> "This decision could have no proper application to a case brought in the State Court under the Federal Civil Rights Act, which vests no specific person or entity with a right of action as a part of the terms of the statute * * *"

If the Civil Rights Act vested no specific person nor entity with a right of action as a part of the terms of the statute, then the Congress of the United States in enacting Section 43, Title 8 U. S. C., was engaged in doing that which was wholly vain. For, if it vested no person with a right of action as a part of its terms, then no person could sue upon said section in any action at law, suit in equity or other proper proceeding for redress and all the decisions of this and other courts to the contrary are wrong.

The State of Georgia in the above case was permitted by this Court to sue in one capacity as a representative "of her people against the continuing wrong done to them," and in another capacity as the individual "owner of a railroad."

The Constitution is a federal law. It contains no joinder provisions. But *Georgia* v. *Pennsylvania R. R. Co., supra,* was a case instituted in this Court by virtue of clause 1 of Section 2 of Article III of the Constitution, providing that

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States * * * to controversies * * * between a state and citizens of another state."

Clause 2 of Section 2 distributing the said jurisdiction provided:

> "In all cases * * * in which a state shall be a party, the Supreme Court shall have original jurisdiction."

These provisions of the federal law contained no joinder provision, but neither did they provide that the State could be cribbed, cabined and confined to any one capacity as a suitor in this Court. And so this Court

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ruled that the fact that Georgia was a State, and that this Court was given jurisdiction to do justice to it as a State, then that this Court was authorized to administer justice and give it relief in any and every capacity in which it appeared as a State, and hence decided the very question to be decided in this case with reference to appellees' contention as to lack of jurisdiction.

This Court's jurisdiction was not divested or crippled by the "more than one capacity" circumstance in that case, and this because the Constitution declared that this Court had jurisdiction—that is, power to enforce the applicable rule, to-wit: administer right and justice under the Constitution to the same State in as many capacities as it had sustained injury.

This Court did not confine its jurisdiction to the application of the federal law in *Georgia* v. *R. R.* to one capacity or another. On the contrary, it properly held that its function was to right Georgia's wrongs sustained in every capacity. It simply held that all of the defendants in that case "shall be liable to the injured party" (to borrow the language of R. S. 1979) in every capacity in which the State alleged and sustained injury.

If the claim that the Civil Rights Act vests no specific person or entity with a right of action as a part of the terms of the statute, and contains no joinder provisions, as appellees claim, then, since the above constitutional provisions are likewise deficient in such provisions, it would seem that, according to appellees, this Court erroneously decided the case of *Georgia* v. *Pennsylvania R. R. Co. et al.*, 324 U. S. 439.

But since said decision is not erroneous, but by virtue of the Constitution formulated and applied the principle authorized by the supreme law which bound the Missouri

court in the decision in this case, and said decision is direct authority for the proposition that this Court has appellate jurisdiction in this case.

Appellees rely on such cases as *Minnesota & St. Louis R. R. Co.* v. *Bombolis*, 241 U. S. 211, and *Mo. ex rel.* v. *Taylor*, 266 U. S. 200, in support of their singular contention. In the Bombolis case, plaintiff recovered and the defendant claimed that since the right to recovery was based on a federal law, then the VIIth Amendment applied. But the Court very properly pointed out that the VIIth was included in the first eight amendments, and that such amendments had been held to have no application to the states ever since its decision *Barron* v. *Baltimore*, in 1832, *Missouri* v. *Taylor, supra*, was a case where plaintiff recovered and wherein a judgment was rendered in the state court against a nonresident defendant whose property was seized by attachment in the state court. But this Court held that on removel to a federal court, an nonresident defendant could not have its property released except as provided under the state law. The question involved in both these cases had nothing to do with the creation of a right of action, or vesting a right in any person who could sue, such as Section 43, Title 8 U. S. C., and the plaintiffs recovered under the federal statutes there involved.

The state cases of *Niehaus* v. *Greenspons and Rockwood* v. *Crown Laundry*, or the other cases on which appellees claim to rely, have no application whatsoever to the question involved in this case.

The word "party," as defined in Webster's College Dictionary, 5th Ed., may include more individuals than one on the opposite side of a contest.

The question here involved has been well decided in

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Picking et al. v. *Pennsylvania R. R. Co. et al.*, 151 Fed. (2d) 240, l. c. 249. There the court, after discussing at length and calling attention to the decisions of this Court, including *Screws* v. *United States*, 325 U. S. 91, *United States* v. *Classic*, 313 U. S. 299, and others, said, l. c. 249:

> "No question as to the sufficiency of the statute to grant a right of civil action should now be heard."

The Court then proceeded, l. c. 249:

> "(10) It follows that if the plaintiffs in the case at bar were deprived of a federal right by state officials or officers acting 'under color of any law'—or as may be stated more aptly in the instant case 'under color of any statute * * * of any State—these officials must respond in damages to the plaintiffs as prescribed by R. S. Sec. 1979. The allegations of the complaint assert in substance that the individual defendants (officers or officials of Pennsylvania or New York) acting 'under color of law' or 'pretense' of law deprived the plaintiffs of liberty without due process of law. The plaintiffs have stated a valid cause of action rising under R. S., Section 1979 * * *"

There is no question in this case as to the jurisdiction and power of the Missouri courts to give relief in a case where an executor and devisee are joint parties plaintiff. The opinion herein states (822):

> "We concede that in some circumstances an executor and a devisee may join as plaintiffs. * * * The petition attempts to state a joint cause of action in favor of Mrs. Moffett as an individual and in her favor as executrix of her deceased husband's estate. * * * True, the petition alleges 'that said property of which plaintiff was so deprived, is, and was, a part of the gains of the industry of plaintiff and her late husband.'"

It thus appears that the ultimate facts are alleged which show that Mrs. Moffett, in every capacity in which she appears in this case, has been injured. And so Mrs. Moffett, in all capacities, comes directly within the description of the person to whom appellees are liable, to-wit: the party injured.

The foregoing demonstrates that the Missouri court has jurisdiction and is able to give Mrs. Moffett, in both capacities, the relief provided by Section 43, Title 8 U. S. C. And so the said contentions of appellees do not aid the court, and have no application, and are invalid.

In their Point II, at pages 21-22 (970), appellees unsuccessfully attempt to point out and distinguish between the principle applied in *Georgia* v. *Pennsylvania R. Co. et al.*, 324 U. S. 439, allowing the same person to sue in two capacities in this Court, and that in *Bell et al.* v. *Hood et al.*, 90 Law Ed. 758, where the question was whether the court had jurisdiction of the suit by a person in two capacities seeking to recover damages for a violation of federal rights. If the suit could not have been brought by two plaintiffs, then the court had no jurisdiction to entertain it. So that the question directly presented and decided in *Bell et al.* v. *Hood et al.* involved the identical question here involved.

Appellees' point is that the Missouri court had no jurisdiction because, say appellees, it had no jurisdiction of a suit by two parties plaintiff jointly, and hence that the court properly dismissed the suit for that reason. But the same principle applied in *Bell et al.* v. *Hood et al.* would have resulted in dismissal for lack of jurisdiction.

But appellees have not once pointed out any distinction between the case at bar and *Picking et al.* v. *Pennsylvania R. Co. et al.*, 151 Fed. (2d) 240, reversing a trial

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court and holding that a husband and wife were jointly entitled to recover against Governor Dewey of New York, Governor James of Pennsylvania, the Pennsylvania Railroad Company and a state judge, and there alleged to be parties to the conspiracy there involved to deprive both plaintiffs of their federal rights by the same acts. Section 43, Title 8, was held to render all those defendants liable to the joint plaintiffs there. All that the appellees say with reference to the Picking case is (970):

> "The plaintiffs, husband and wife, in *Picking* v. *Pa. R. Co.*, 151 Fed. (2d) 240, upon which appellants rely, could not have maintained their suit in a Missouri state court under the foregoing applicable Missouri authorities."

In other words, appellees agree that appellants could recover on the federal statutes, R. S. U. S., Secs. 1979, 1980 and 1981, in any national court. But they say that they cannot "in a Missouri state court under the foregoing applicable Missouri authorities."

They have failed to take into consideration that Section 43 authorizes a recovery in an action at law, suit in equity or "other proper proceeding for redress." When the Congress inserted the words "proper proceeding for redress," did the Congress not intend that whatever might be a proper proceeding for redress in any national court would also be a proper proceeding for redress in any state court based on the federal laws?

Appellees have failed to call attention to the case of *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, same case 101 Fed. (2d), where it was held that numerous persons as plaintiffs in the same case were entitled to relief under Section 43, either at law or in equity, and get equitable relief as well as damages under

Section 43. Do not these circumstances establish the truth that the founding fathers intended that the provision of clause 2 of Article VI of the Constitution should apply in and govern the state court in this case? We reproduce that clause 2 of Article VI of the Constitution:

> "* * * This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

Appellees admit that appellant in both capacities could recover in a federal court on these federal statutes. They forget that a state court, in passing on federal statutes, is a federal court. Why should not the same rule apply in a state "federal court" that applies in a United States "federal court"? Must not the "supreme law of the land" be applied in the state federal court in an action based on federal statutes and the Constitution, regardless of what the state law may be? If not, are the state judges bound by the supreme law, or may they ignore the supreme law and do as the state court did herein—regard themselves bound by anything they suppose is contained in the laws of Missouri to the contrary?

The point to be determined in this case on this question is: Which law governs? Of course, the conclusion must be that the supreme law governs. For this Court has never permitted Missouri, or any other state, to deny federal rights to any person by virtue of any state law when it came in conflict with Federal Statute, Treaty or Constitution.

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In *Kring* v. *Missouri*, 107 U. S. 221, this Court said, l. c. 231:

> "The word *procedure*, as a law term, is not well understood, and is not found at all in Bouvier's Law Dictionary, the best work of the kind in this country."

It also declared that the word procedure is a modern word, and that constitutional or federal rights could not be wiped out by the State of Missouri by giving effect to a procedural law which would conflict with the supreme law, and reversed its decision. In other words, it said that, with reference to federal rights, there was no difference between procedural laws and substantive law. And, of course, there could not be under the impersonal and all-embracing command of the Constitution that "the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." Said impersonal and all-embracing command deprives every State Court and Judge of any power to write any exception into the fundamental law, and the exception written therein by the Missouri court in this case was not justified and necessitates reversal.

The only theory on which the contentions of appellees in their Point II could be sustained is upon the theory that we live under a system of government founded on an inversion of the first principles of government.

That is to say, on the theory that these United States are subordinate to the authority of Missouri. But Madison in his Federalist paper No. 44 points out that the supremacy clause of the Constitution does not permit such an application as appellees suggest of the supremacy clause above quoted. Madison said:

"A fifth class of provisions in favour of the federal authority, consists of the following restrictions on the authority of the several states.

• • • • • • •

'This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.'

The indirect zeal of the adversaries to the constitution, has betrayed them into an attack on this part of it also, without which it would have been evidently and radically defective. To be fully sensible of this, we need only suppose for a moment, that the supremacy of the state constitutions had been left complete, by a saving clause in their favour.

In the first place, as these constitutions invest the state legislatures with absolute sovereignty, in all cases not excepted by the existing articles of confederation, all the authorities contained in the proposed constitution, so far as they exceed those enumerated in the confederation, would have been annulled, and the new congress would have been reduced to the same impotent condition with their predecessors.

In the next place, as the constitutions of some of the states do not even expressly and fully recognize the existing powers of the confederacy, an express saving of the supremacy of the former would, in such states, have brought into question every power contained in the proposed constitution.

In the third place, as the constitutions of the states differ from each other, it might happen that a treaty or national law of great and equal importance to the states, would interfere with some, and not with other constitutions, and would consequently be valid in some of the states, at the same time that it would have no effect in others.

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> In fine, the world would have seen for the first time, a system of government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members."

This Court, in *Brown* v. *Walker*, 161 U. S. 591, in discussing an Act of Congress prohibiting prosecution, penalty or forfeiture for or on account of any transaction, matter or thing concerning which a person might testify or produce evidence "was a rule of procedure which was binding in the courts of any State." It points out that, while the Constitution does not operate upon a witness testifying in the state courts, yet l. c. 606:

> "There is no such restriction, however, upon the applicability of Federal statutes. The 6th article of the Constitution declares that 'this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.'
>
> The language of this article is so direct and explicit that but few cases have arisen where this court has been called upon to interpret it, or to determine its applicability to state courts."

The court then called attention to other decisions dealing with procedure concerning federal rights in state courts, and then said, l. c. 607:

> "The act in question contains no suggestion that it is to be applied only to the Federal courts."

And after further discussion concluded, l. c. 608:

> "* * * but the immunity extends to any *transaction, matter, or thing* concerning which he may testify, which clearly indicates that the immunity is intended to be general and to be applicable whenever *and in whatever court* such prosecution may be had."

The appellees claim that the state courts, both trial and Supreme, decided no federal question, except that Section 948 was not a bill of attainder. But the State Supreme Court points out (820):

> "Appellants claim error under twenty-two numbered assignments, some being mainly a repetition of others. We have considered all of these assignments, but see no useful purpose in discussing each one separately."

Appellants properly presented all the federal questions appearing in the assignments of error so mentioned by the state court.

Appellees' said claim is tantamount to an accusation that the judges of the Supreme Court of Missouri did not do their duty and decide the federal questions which were properly presented for their decision under the state law. Had the State Supreme Court failed to decide such questions, then such failure, under the decision of this Court in *State ex rel. Lawrence* v. *State Tax Commission*, 286 U. S. 276, would be a denial of the rights secured to them by Section 1 of the XIVth Amendment.

Appellees contend that instead of the Constitution meaning what Madison says and what this Court has said, that it really means that the Constitution and the laws of Missouri shall be the supreme law of the land in every case on which a federal right is based and that the judges

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of the nation shall be bound by the law of Missouri, anything in the laws or treaties or the Constitution of the United States to the contrary notwithstanding.

The contention of appellees in their Point II (968-974) might be appropriate under the old Confederation, for there no "supreme law provision" restricted the judges of the states, but it cannot avail here.

V.

However, the state law did authorize appellants to maintain the instant action jointly. Sections 856, 857 and 858, R. S. Mo. 1939, are as follows:

"Sec. 856. Whenever a cause of action has accrued under or by virtue of the laws of any other state or territory, such cause of action may be brought in any of the courts of this state, by the person *or persons* entitled to the proceeds of such cause of action: *Provided,* such person or persons shall be authorized to bring such action by the laws of the state or territory where the cause of action accrued.

"Sec. 857. Whenever any cause of action has accrued under or by virtue of the laws of any other state or territory, and the person or persons entitled to the benefit of such cause of action are not authorized by the laws of such state or territory to prosecute such action in his, her or their own names, then, in every such case, such cause of action may be brought and prosecuted in any court in this state by the person *or persons* authorized under the laws of such state or territory to sue in such cases. Such suits may be brought and maintained by the executor, administrator, guardian, guardian *ad litem,* or any other person empowered by the laws of such state or territory to sue in a representative capacity.

"Sec. 858. The proceeds of any action brought under section number 857 of this article shall be distributed by the person bringing such suit, and

paid to the person or persons entitled thereto, according to their respective interests therein, under the laws of the state or territory wherein the cause of action arose."

In *Shaw* v. *Railroad*, 314 Mo. 123, at l. c. 130, it is said:

"• • • where a cause of action is given by the Federal Government, and made enforceable in the state courts, as are cases under the Employers' Liability Act, such a law is not one of a foreign country, but is one which fairly comes within the terms of Section 1163, Revised Statutes 1919, relative to our practice in this State. It is a part of the law in every State. (See also *State ex rel.* v. *Hoffman*, 274 S. W. 362.)"

Section 1113, R. S. 1919, is a duplicate of Section 857, R. S. Mo. 1939.

In *Bright* v. *Wheelock*, 323 Mo. 840, the court held that said sections were mandatory and compelled a Missouri court to assume jurisdiction of cases arising under the federal law, regardless of the decision of this Court in *Douglass* v. *Railroad*, 279 U. S. 377. And, after pointing out that this Court there held that there was no obligation on the New York state court to entertain a suit arising under said federal law in another state, yet the Missouri court said, l. c. 876:

"However, our own court has not construed the (somewhat similar) statutes of this state (Secs. 1163, 1180, R. S. 1919) to invest the courts of this state with the discretion to refuse to entertain jurisdiction of such a suit. Our previous rulings, as announced in the Shaw, Wells and Foraker cases, *supra*, appear to be to the effect that the statutes, *supra*, do not invest the courts of our state with such discretion, and we see no good or sufficient reason for overrul-

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ing, at this time, our prior decisions construing such statutes. It would seem to us that the correction of the evil (herein complained of by respondents), if there be any evil, lies with the Legislature rather than with the Judiciary."

Section 1163, R. S. 1919, above referred to is a duplicate of Section 857, R. S. Mo. ~~1919~~ 1939.

See also *Hotchkiss* v. *Ogle*, 153 Kan. 156, l. c. 162, where it is said:

"It is argued, also, that there was a misjoinder of parties plaintiff. The petition frankly alleged the action was brought for the benefit of heirs, that one of them had joined as plaintiff, and she made no claim to the entire estate but only to her distributive share as an heir. Such procedure is authorized (G. S. 1935, 60-410, 60-412). There was no conflict in the relative purposes of the plaintiffs. The joinder of plaintiffs here did not prevent defendants from making their defense, nor otherwise operate to their prejudice. (*Sentney* v. *Commercial National Bank*, 128 Kan. 107, 275 Pac. 1081; *Phoenix Mutual Life Ins. Co.* v. *Nevitt*, 147 Kan. 772, 78 Pac. (2d) 913.)"

Sections 60-410 and 60-412, R. S. Kan. 1935, are duplicates of Sections 850 and 851, R. S. Mo. 1939.

Under Sections 850 and 851, R. S. Mo. 1939, it is held that an heir and administrator can join as parties plaintiff, just as the Missouri court has held, throughout the years, in *Butler* v. *Lawson*, 72 Mo. 227, and as the Missouri Supreme Court recently held, *en banc*, in *Young* v. *Boatmen's National Bank*, 171 S. W. (2d), l. c. 563:

"Respondents have cited several cases holding that where real and personal interests are intermingled and involved in the same suit, the administrator may

bring, defend or join in the action. They are: *Butler* v. *Lawson*, 72 Mo. 227, 247-8; *Bacon* v. *De Armond*, *supra*, 226 Mo. App., loc. cits. 626, 627, 47 S. W. (2d), loc. cit. 215 (9); *Parker* v. *Simpson*, 180 Mass. 334, 341 (2), 62 N. E. 401, 403 (2)."

Syllabus 22 of the same case reads:

"Where intestate's real and personal interests are intermingled, in the same suit, the administrator may bring, defend, or join in the action."

Section 851, R. S. Mo. 1939, is:

"Sec. 851. All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this article."

There is no provision otherwise in the article.

Sections 850 and 851 were applied by the court in *Butler* v. *Lawson*, 72 Mo. 227, and have been applied throughout the years in support of the proposition that there may be a joinder in Missouri of parties plaintiff under the circumstances here involved. See *McLain* v. *Atlas Assur. Co.*, 67 S. W. (2d) 849.

The foregoing, with reference to the state law, is included, not for the purpose of showing that a federal question is in this case, but for the purpose of demonstrating that the decision of the state court is not based upon an adequate state ground broad enough to support it.

And in any event, in view of the fact that Judge Ridge was without jurisdiction to rule on the demurrers in violation of Rule 29 (402-403), or sustain appellees' motions included in the alleged demurrers without one day's notice under Section 965, R. S. Mo. 1939; and in view of

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the fact that Sections 948 and 922, R. S. Mo. 1939, were ineffective ~~to accomplish that which appellees sought to accomplish on December 30, 1941,~~ four hours after they had accomplished the result they sought, under the new code which came into existence on the following court day, prohibited the filing of demurrers and prohibited the dismissal of actions on the ground or cause on which Judge Ridge based his ruling, and based his application, without notice, trial or hearing on Section 948. Par. 18 of Motion for Rehearing and to transfer to court, *en banc* (843-844), disclose that in Missouri and every other state with a like code provision as to demurrers, a demurrer for misjoinder of parties does not lie.

The statement of appellees on page 19 of their suggestions (968) that

> "All that the Supreme Court of Missouri has decided, in the instant case, is that under the applicable law appellants had no right to maintain *jointly* the instant suit"

contradicts the Supreme Court of Missouri because its opinion refers to the 22 assignments of error (820), saying "We have considered all of these assignments" (820). On the same page they say:

> "The ground of failure to state a cause of action as sustained by the opinion quoted, thus relates solely to the failure to state a cause of action in favor of plaintiffs jointly. *Fadler* v. *Gabbert*, 333 Mo. 851, l. c. 863, 63 S. W. (2d) 121, l. c. 127; *Akins* v. *Hicks*, 109 Mo. App. 95, l. c. 99, 83 S. W. 75, l. c. 76."

Said decisions are based on an erroneous statement of the alleged law of New York as set forth in *Brownson and Wife* v. *Gifford*, 8 How. Pr. 389, cited in support of the text of *Barbour on Pleadings to Actions*, 459—referred

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to in said cases in support of the erroneous doctrine on which Commerce Trust Company relies.

In *Akins* v. *Hicks*, 109 Mo. App. 95, l. c. 99, the Kansas City Court of Appeals recognized that the statute, Section 922, did not provide that misjoinder should be a cause for demurrer, saying:

> "By Section 589, Revised Statutes 1899, a defect of parties is a good ground of demurrer but it does not provide in terms that a misjoinder shall be cause for demurrer. And it has been held that, 'where there is a misjoinder of plaintiffs a demurrer will lie not solely on account of the misjoinder but because in such a case the complaint does not state a cause of action in favor of the plaintiff.' *Barbour on Pleadings to Actions* (2 Ed.) 459. The distinction, however, is technical and immaterial under our practice, as a failure of the pleadings to state a cause of action is, as a matter of course, a good ground for demurrer."

In *Fadler* v. *Gabbert*, 333 Mo. 851, l. c. 863, ~~this~~ the Court discussed the question as follows:

> "(1) I. *Misjoinder.* By way of preliminary observation, we may say that a defect of parties plaintiff means too few parties and hence is not synonymous with misjoinder of parties which means an excess of parties, one of the grounds of complaint here (31 Cyc. 284). We may also note that Section 770, Mo. Statutes Annotated 1929, makes a defect of parties cause for demurrer, but does not in terms make misjoinder a cause. However, a misjoinder of parties plaintiff is ground for demurrer for the reason that in such case the petition does not state a cause of action. (*Akins* v. *Hicks*, (Mo. App.) 83 S. W. 75; *Barbour on Pleadings to Actions* (2 Ed.) 459.)"

It thus appears that the Missouri courts there recognized that Section 922 does not make misjoinder a ground

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of demurrer. But the reasoning in *Akins* v. *Hicks*, followed by ~~this~~ the *Court*, was based on the text of *Barbour on Pleadings to Actions*, 2d Ed. 459. That work was published in Albany, New York, and was dealing with pleadings in that State. Mr. Barbour cites two cases in support of his text: *Walworth* v. *Handy*, 24 How. Pr. 323, and *Martin and Wife* v. *Marsh*, 21 How. 372. *Walworth* v. *Handy* was decided at the February Special Term, 1863, and followed the opinion of the Supreme Court in General Term in *Martin and Wife* v. *Marsh, supra.*

In *Walworth* v. *Handy*, the wife and her husband were parties plaintiff. The wife's alleged right was an incohoate right of dower through her husband in the lands devised to him under the will. Said the court:

> "Borbour on Pleadings cited *Walworth* v. *Handy*, 24 How. Pr. 353, at the Saratoga Special Term. That was a case to construe a will. The wife had an incohoate right of dower through her husband and this right attached to the lands to which he was entitled by the will. Said the Court:
>
> > 'It seems plain that the wife of Wm. Walworth was an unnecessary party plaintiff.'
>
> * * * * * * *
>
> "* * * it has been said that a demurrer must be sustained or fail to the whole extent to which it is applied; and that where a demurrer is to the whole complaint, if one of the plaintiffs might have had judgment separately, it is bad. *But in Brownson and Wife* v. *Gifford*, (8 How. 389) *it was held on demurrer that the action should have been brought by Mrs. Brownson alone and that her husband was improperly joined as plaintiff.*"

It then proceeded to hold that unless both plaintiffs were entitled to recover, neither was, saying:

> "* * * when two or more plaintiffs unite in bringing a joint cause of action, and the facts do not show

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> a joint cause of action in them, a demurrer will lie upon the ground that the complaint does not state facts sufficient to constitute a cause of action,"

following *Martin and Wife* v. *Marsh*, 35 Barb., 68 S. C., 21 How. 372. (February, 1863).

But the Court of Appeals for the State of New York, in *Palmer* v. *Davis*, at the March, 1863, term, *expressly disapproved of the decision in Brownson and Wife* v. *Gifford et al.*, l. c. 245, and correctly stated the applicable law demonstrating that the authorities cited by Mr. Barbour in support of his text, and consequently the text referred to by ~~this~~ the Court in the *Fadler* v. *Gabbert* case, and the Court of Appeals in *Akins* v. *Hicks*, the allegations in the respondents' alleged demurrers as to misjoinder of parties plaintiff are without a legal basis on which to rest.

We direct the Court's attention to the quotation from the New York Court of Appeals in *Palmer* v. *Davis*, 28 N. Y. 242, wherein it expressly holds that *Brownson and Wife* v. *Gifford*, 8 How. Pr. 389, is wrong, using the following language:

> "The decisions, however, in *Brownson and Wife* v. *Gifford*, and others, sustaining the demurrer on the ground of a *defect* of parties, was undoubtedly wrong."

Whatever may be the rule with reference to alleged joint contracts, or to several contracts where there are more plaintiffs than one, yet with reference to the facts in this case the decisions on which appellees rely do not correctly declare the law, either of this State or of the State of New York .

That suggestion was treated (471-474) in appellants' suggestions in opposition to respondents' motion to strike. *Fadler* v. *Gabbert* and *Akins* v. *Hicks* made statements which were both obiter, and also shown by the foregoing authorities to be incorrect statements of the law. In other words, these casese were based on over-

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ruled New York law and are not now and never were Missouri law.

This Court may wonder why the Missouri court, notwithstanding the statute does not authorize a demurrer for misjoinder of parties, has continued to use the phrase "misjoinder of parties" with reference to demurrers. The greater portion of the early settlers of Missouri were profound common law lawyers. In *State* v. *Fry*, 4 Mo. 120, l. c. 176-177, the court said:

> "• • • We live in the midst of the common law, we inhale it at every breath, imbibe it at every pore, we meet it when we wake, and when we lie down to sleep, when we travel and when we stay at home; it is interwoven with the very idiom that e speak; and we cannot learn another system of laws, without learning at the same time another language."

The sons of the judges and lawyers who were thus so familiar with the common law imbibed it from their ancestors, and it has continued to this hour, so that some of the venerable lawyers who represent appellees, and some of the judges, as a part of their inheritance, are still saturated with the erroneous principles of the common law which the legislature long since discarded.

However, in the decided cases in Missouri, it will be found that where demurrers were sustained upon the ground of alleged misjoinder of parties the cases involve or dealt with actions on contract and really applied different principles from that known as misjoinder of parties. So that, if a suit were brought by two obligees when the pleaded contract disclosed that there was only one, then a demurrer upon the alleged ground of misjoinder of parties plaintiff would be sustained, whereas the real question involved was not a question of pleading but a question of substantive law. Rulings that two alleged obligees could not recover upon a contract where only one of them was an obligee are sometimes referred to as rulings on the ground of misjoinder of jarties whereas

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such ruling is on a question of substantive law to-wit, that a recovery cannot be had on a different case from that alleged. And this because the proof of the contract with one would not be proof of the contract with two, and to permit recovery would be to permit such litigants to sue on one contract or cause of action and recover on another. That principle has also sometimes been applied when two parties joined in a suit on two separate contracts, in which case the real ground for sustaining a demurrer is misjoinder of causes of action rather than misjoinder of parties.

The principle involved is well illustrated by the opinions in *State ex rel. Massman Construction Co.* v. *Shain*, 346 Mo. 1003, and *Scott* v. *Alton Banking Co.*, 175 S. W. 920.

Supplemented by *Walker* v. *Lewis*, 140 Mo. App. 26.

And, in any event, on this question of misjoinder of parties plaintiff, the Missouri law, as stated in *Drakopulos* v. *Biddle*, 288 Mo. 424, points out that appellees had no concern as to who were parties plaintiff in this case save and excepting that whoever prosecuted the action should be competent to maintain it in such a way as to bar any other action for the same injury. At l. c. 433 the court said:

> "The only concern of defendants as to parties plaintiff is that whoever prosecutes the action shall be competent to maintain it in such a way as to bar any other action for the same injury."

In the later case of *Webster* v. *Water Works Co.*, 352 Mo. 327, the court followed Drakopulos with approval in the year 1944.

VI.

Appellees say on their page 11 (960) that the penalty specified in Section 948 was "a compensation to the injured party." They cite countless inapplicable cases from

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this and other courts. Had they only looked at the case of *State ex rel. Crutcher* v. *Koeln*, 332 Mo. 1229, they would have found that the Supreme Court, *en banc*, in that recent case, settled the question against appellees by the following language, l. c. 1236:

> "'In their origin, costs were known as a *punishment* of the defeated person * * * rather than as a *recompense* to the successful party' * * * and today 'costs are included in the generic term penalty'."

Not only did the court thus apply the punishment to appellants, but it dismissed appellants' action which had been pending since August 22, 1941, and used the dying hours of the age-old statutes for an iniquitous and unjust purpose, to-wit: to deprive appellants of the benefit of the New Code in violation of her rights under the XIVth Amendment, which had accrued to appellants when the appellees filed their demurrers to the fifth amended petition as amended on December 30, 1944. Appellees indeed saw to it that under the judgment rendered appellants could not reinstate the suit. For under the decision in *Swing* v. *Furniture Company*, 150 Mo. App. 574, the judgment was a decision on the merits.

Appellants assigned error in the state court on that ground under assignments III (945) and XXII (948). While the court said they considered the assignments (820), they stated nothing in the opinion indicating that the judgment was not on the merits. We direct attention to the suggestions contained in the transcript filed by appellees, from which it appears that they made no such contention in the Supreme Court of the state, and this for reason that they knew that the judgment of the Circuit Court was a judgment on the merits under the Swing case,

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and they desired to be protected by the erroneous judg
ment in the future (854-856) (858-861).

But even if it could be held that the form of the judg
ment was not on the merits, yet the Supreme Court of th
state, by its decision and opinion, made it a judgmen
on the merits.

And then, since appellants' petition was based upon th
federal statutes, because of the denial of due process t
plaintiffs by the Kansas and Missouri courts, the findin
by the Missouri Supreme Court that "appellants hav
not been denied due process" (827) was a decision whic
forever protected appellees in all courts against an
further litigation by appellants in any capacity. And th
because the Supreme Court of Missouri has itself de
clared that its opinions are its decisions. See *Edwards*
Bell, 343 Mo. 824, l. c. 826.

The new constitution of 1945, which went into effe
after this case was appealed and pending on appeal i
the Supreme Court of the state, declared that the Suprem
Court was the highest court in the state and specifically
provided that "its decisions shall be controlling in a
other courts." (Article V, Sec. 2.) And so the decisio
of the State Supreme Court in affirming the judgment
the Circuit Court, and in specifically making the findin
it did, was more of a bill of pains and penalties than th
decision of the trial court. And together they punishe
and destroyed appellants by forever preventing recover
for the violation of her federal rights set forth in th
fifth amended petition as amended, and in the assignmen
of error in this Court (934-940).

Beginning on page 46 and continued to page 60 (99
1009) of their suggestions in opposition to jurisdictio
appellees tell this Court what the records show, and th
notwithstanding the records to which they refer are n

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part of this case. Said discussion merely amounts to a claim that appellees have a defense, which, of course, should properly be pleaded in an answer.

VII.

On pages 61-66, inclusive (1010-1015), appellees indulge in a dissertation with reference to the judicial notice which this Court will take of its records.

We have no quarrel therewith, for the reason that none of those records disclose anything which militates against appellants' rights to recover on the pleaded cause of action.

They call attention to orders of this Court denying applications for certiorari, which, of course, were not on the merits, and decided nothing.

VIII.

On page 67 (1016) appellees sedulously omit to call attention to the fact that only one issue was tried in the Howard fee case, 345 Mo. 741-751, and the basis, as appears in the premises, was that Commerce Trust Company and appellee Howard unlawfully represented conflicting interests. The obligation to determine the question of *res judicata* ~~rested~~ rests on the trial court, when the case is tried, to apply the law to the pleaded facts insofar as supported by evidence on that question as on every other.

In thus failing to apply the doctrine of *res judicata*, the court failed to accord to appellants the protection of the laws of the state, for the judgment in that case reversing the decision and directing that no fee be paid to appellee Howard by Commerce Trust Company from Moffett Brothers' assets was because both Howard and

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Commerce Trust Company unlawfully represented co
flicting interests. And the finding as to the premises w
as conclusive as the judgment in the Missouri State cou
as appears from the statement made in *Dickey* v. *Hei*
48 Mo. App. 114, where the court said, l. c. 120:

> "'A verdict and judgment are conclusive by w
> of estoppel only as to those facts which were nec
> sarily involved in them, without the existence, pro
> or admission of which such a verdict and judgme
> could not have been rendered.' *It is denominated*
> *reasoning backward from the judgment to the ba*
> *on which it stands,' 'upon the obvious principle th*
> *where a conclusion is indisputable and could ha*
> *been drawn only from certain premises the premi*
> *are equally indisputable with the conclusion'.*"

This principle is embodied in the *en banc* opinion
State ex inf McKittrick v. *Missouri Public Service Cor*
ration, 351 Mo. 961, where, at page 973, citing *Dickey*
Heim, supra, as authority, the universal law on this qu
tion is stated as follows:

> "A judgment is conclusive in a subsequent acti
> between the same parties on the same cause of acti
> of all matters which might have been litigated there
> but where the causes of action are different, ev
> where the parties are the same, it is only conclusi
> of matters which were in fact litigated therein."

IX.

The error of the court in denying appellants' right
the equal protection of the laws under the XIVth Amen
ment was raised as soon as it could be, to-wit: after t
Supreme Court failed to give *res judicata* effect to t
said premises, in the petition for rehearing and to tra
fer to the court *en banc* (837).

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On page 71 (1020) appellees claim that the Supreme Court did not hold that the petition did not state a cause of action. We refer this Court to the opinion of the state court (819-827).

Under Point IX (1021) appellees claim that they never admitted, in any manner in any place, that the acts of Judge Hay were corrupt. But the third amended petition (62-135), at the request of appellees (429) is embodied in the record herein. At no place therein did it use the adjective "corrupt" or "corruption." It merely stated what the Kansas district judge had done. Extracts from their brief are in the record at pages 299-306 and show what their language was. So that, by their demurrers, they admitted the truth of the allegations in the third amended petition, and by their briefs they expressly stated that charges admitted by them to be true by their demurrers in the third amended petition concerning the Kansas judge, consisting of the allegations of fact, were allegations of admitted facts which warranted their solemn admission that said judge was "corrupt" and his court "corrupt."

We respectfully submit that appellees' denials on their page 72 of their suggestions (1021) that they did not so admit is a question to be tried by the trial court, and their demurrers to the fifth amended petition, admitted that under the facts alleged, the Kansas district judge was "corrupt."

X.

On pages 80 to 83, inclusive, of appellees' discussion (1029-1032) they refer to the "Comanche case."

By their demurrers they admit the truth of the allegations in the petition as to that case, and if there be records to show what they indicate, then, of course, they can

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offer same. But this is an inappropriate place to c
same, especially since their statements are incorrect.
instance, on page 82 (1031) they say:

> "The attorneys in the instant case were the s
> attorneys who tried the case before Judge Carl
> ler in the District Court of Comanche County."

The writer hereof was never in that court.

It is rather inappropriate to show that this Court
no jurisdiction to make statements resting solely in
imagination of appellees, with reference to wholly
material facts.

But they further say that certain pages of docum
in connection with certiorari show that the exact d
ments complained of on their petition had been introd
in evidence by them at the trial of the case in Coma
County, Kansas. This flagrant error warrants the
clusion that appellees have no substantial objection to
jurisdiction of this Court, for it appears from their d
ments that a copy which Mr. Watson attempted to in
duce was not received in evidence because of extr
fraud of appellees.

XI.

The claim is made in appellees' Point XI, on pages
87, inclusive (1033-1036), that the institution and ma
nance of the fictitious suits for $2,539,366.80 (268) for
teen years in the state courts did not deprive appel
of any federal rights so as to vest jurisdiction in
Court. But they admit the allegation that they unlaw
deprived appellants of their property thereby in viol
of the XIVth Amendment.

The allegations with reference to the fictitious suit

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covered by the principles stated in 12 C. J., Sec. 110, at page 588, as follows:

> "Sec. 110. Conspiracy to Use Legal Proceedings Fraudulently to Injure Another. Where parties, in pursuance of a conspiracy or combination for that purpose, fraudulently make use of legal proceedings to injure another, an action lies against them, at the suit of the person injured, to recover damages sustained. And the fact that a combination for fraud has been brought to a successful end by false testimony produced on the trial does not make an action for conspiracy obnoxious to the rule that there can be no civil action for perjury or subordination of perjury."

These fictitious suits, instituted for the purpose of unlawfully keeping the cases on the dockets, and to prevent appellants from having their properties distributed to them, was an unlawful use of the courts to deprive appellants of their property, without due process of law, throughout all of these years, and to deny them the equal protection of the laws, and to breach their privileges and immunities under the United States Constitution and Laws, and admit that appellants' (322)

> "• • • overt acts, pursuant to said conspiracy, deprived them of the natural rights to the enjoyment of said gains of their own industry, and, as to them, frustrated the purpose of all constitutional government, and thereby caused the government to fail of its chief design and to obliterate all constitutional government as to said rights of this plaintiff, and caused the states aforesaid to ignore plaintiff's privileges and immunities as a citizen of the United States, and her right not to be deprived of said property without due process of law, and denied the equal protection of the laws and of those rights secured

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by Section 2 of Article IV and of Section 1 of the XIVth Amendment to the Constitution of the United States."

They say at page 84 (1033) the fourteen fictitious suits were all pending at the time this petition was filed. They say, on page 85 (1034):

> "• • • that by reason of the disposition adverse to appellants of many of these alleged fictitious suits, there are only a few remaining to be tried."

Only one of the fictitious suits so instituted was tried in the district court of Harper County, Kansas. They also say that appellants have a complete remedy, citing *Guhman* v. *Grothe*, 346 Mo. 427. It appears from the petition that appellants have unsuccessfully endeavored to obtain such remedy in the state court (297-298), which refused to apply *Guhman* v. *Grothe, supra.* The state courts refused to do anything to relieve appellants (298) from this awful burden.

It is held in Missouri that the institution of fictitious suits, in and of themselves, renders the attorney and client liable, whose acts in bringing said suits occasion damage. (*White* v. *McCoy Land Co.*, 87 S. W. (2d) 672, 229 Mo. App. 1019; *White* v. *Scarritt*, 341 Mo. 1004; *White* v. *McCoy Land Co.*, 101 S. W. (2d) 763.

XII.

In their Point XII (1037-1039), appellees say that appellants

> "• • • are completely in error in the contention that there is a right of action for conspiracy alone."

Appellants never made any such contention.

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XIII.

In their Point XIII at pages 91 to 95, inclusive (1040-1044), appellees admit the overt libelous act pursuant to the alleged conspiracy, but they do not quote the part of the petition that states where the libelous statements were published.

The petition itself discloses and their demurrers admit that the said statements were made in briefs filed by appellees' counsel in the court wherein the case was pending in support of their demurrers, admitting the truth of said petition, and by which briefs said appellees convinced the court that the truth which they admitted by the demurrers was untrue in their briefs.

This was not an action for libel, but, as they admit, an additional overt act pursuant to the conspiracy. And, as appellant had the absolute right to select the law under which she would proceed (*Bell et al.* v. *Hood et al.*, 90 Law Ed. 758-762, her petition charged that the libelous brief was an overt act pursuant to the conspiracy and not a mere separate cause of action for libel, but an incident and link in the conspiracy (*Truax* v. *Corrigan*, 257 U. S. 312).

XIV.

Point XIV in appellees' pages 96 to 99 (1045-1048), asserts that the special judges were *de facto* judges. That they were not is demonstrated by the Missouri statute adopting the common law of England, except insofar as not in conflict with the state or United States Constitution, or any statute.

And since the *de facto* rule is a common law rule, its application in this case was in conflict with the express

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